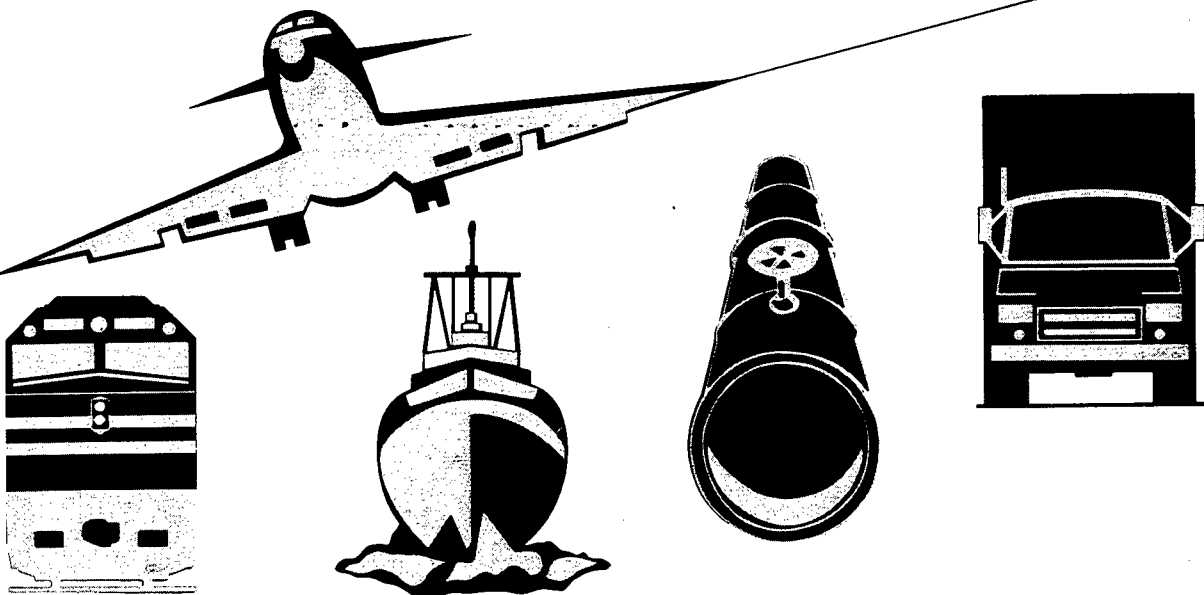


NATIONAL TRANSPORTATION SAFETY BOARD

TRANSPORTATION INITIAL DECISIONS AND ORDERS AND BOARD OPINIONS AND ORDERS

**ADOPTED AND ISSUED DURING THE MONTH
OF JULY, 1998**



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16. Abstract This publication contains all Judge Initial Decisions and Board Opinions and Orders in Safety Enforcement and Seaman Enforcement Cases for July 1998. <table style="width: 100%; margin-top: 20px;"> <tr> <td style="width: 33%;">EA-4679 TSOSIE</td><td style="width: 33%;">SE-9131RM WILSON</td><td style="width: 33%;"></td></tr> <tr> <td>EA-4682 PROPST</td><td>259-EAJA-SE-14023</td><td></td></tr> <tr> <td>EA-4680 FROST</td><td>GARTNER</td><td></td></tr> <tr> <td>EA-4681 OVOST</td><td>SE-15154 ZERKEL</td><td></td></tr> <tr> <td>EA-4683 WINDWALKER</td><td>SE-14807RM KIRSCH</td><td></td></tr> <tr> <td></td><td>SE-14832RM RODERICK</td><td></td></tr> <tr> <td></td><td>SE-15305 DIRKSEN</td><td></td></tr> <tr> <td></td><td>260-EAJA-SE-14617</td><td></td></tr> <tr> <td></td><td>HAMILTON</td><td></td></tr> <tr> <td></td><td>SE-15171 PETERS</td><td></td></tr> </table>				EA-4679 TSOSIE	SE-9131RM WILSON		EA-4682 PROPST	259-EAJA-SE-14023		EA-4680 FROST	GARTNER		EA-4681 OVOST	SE-15154 ZERKEL		EA-4683 WINDWALKER	SE-14807RM KIRSCH			SE-14832RM RODERICK			SE-15305 DIRKSEN			260-EAJA-SE-14617			HAMILTON			SE-15171 PETERS	
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OPINIONS AND ORDERS
FOR THE MONTH OF JULY 1998

SERVED: July 2, 1998

NTSB Order No. EA-4679

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of July, 1998

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

FRED MEAD TSOSIE,

Respondent.

Docket SE-15216

OPINION AND ORDER

The Administrator has appealed from the oral initial decision rendered by Administrative Law Judge William R. Mullins in this proceeding, immediately following a hearing on May 27-28, 1998.¹ By that decision, the law judge, while affirming all but

¹The initial decision is attached. The Administrator has filed a brief on appeal, to which respondent has replied. Respondent has filed two motions to dismiss, contesting the timeliness of the Administrator's notice of appeal and appeal brief. Both documents were timely filed and, thus, both motions are denied.

one of the charges alleged in the Administrator's emergency order of revocation (complaint), reduced the sanction from revocation of respondent's commercial pilot certificate to a 30-day suspension.² The Administrator appeals the dismissal of the 91.13(a) charge and the change in sanction. As discussed below, we will grant the Administrator's appeal, in part.

The complaint read, as pertinent:

1. You are now, and at all times mentioned herein were, the holder of Commercial Pilot Certificate 527842361.
2. On March 11, 1998, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.
3. You were paid \$650.00 for the flights referenced in paragraph 2, above.
4. On November 24, 1997, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a

²The Administrator alleged that respondent violated sections 119.5(g), 135.95(b), 135.251(a), 135.255(b), 135.293(a) and (b), 135.299(a), and 91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91, 119, and 135. These regulations appear in the Appendix, attached.

The law judge dismissed the section 91.13(a) charge. We note that in the recitation of his order, the law judge omitted (we believe inadvertently) one of the charges. He specifically found no violation of section 91.13(a), found a violation of FAR sections 119.5(g), 135.95(b), 135.251(a), 135.255(b), 135.293(a) and (b), but did not mention 135.299(a). (Transcript (Tr.) at 315.) It appears that this was an oversight since, in the body of the initial decision, he concluded that respondent had violated FAR 119.5(g) and "the different regulatory violations alleged under FAR 135," but stated that he did not find a violation of section 91.13(a). (Tr. at 314.) Therefore, our order will be corrected to include the section 135.299(a) violation.

round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.

5. You were paid \$650.00 for the flights referenced in paragraph 4, above.
6. On December 5, 1997, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.
7. You were paid \$650.00 for the flights referenced in paragraph 6, above.
8. On December 8, 1997, returning December 10, 1997, you were pilot in command of civil aircraft N2676B, a Cessna 340A aircraft on a round trip passenger-carrying flight from Window Rock, AZ, to Phoenix Sky Harbor International Airport, Phoenix, AZ.
9. You were paid \$350.00 for the flights referenced in paragraph 8, above.
10. You operated the flights referenced above when you had not:
 - a. obtained an appropriate certificate;
 - b. obtain[ed] operations specifications appropriate to each kind of operation conducted;
 - c. been through an appropriate drug testing program;
 - d. been subject to an appropriate alcohol testing program;
 - e. passed a required annual knowledge check given by the Administrator or an approved check airman;
 - f. passed an annual flight competency check given by the Administrator or an approved check airman;
[or]
 - g. passed an annual route check given by the Administrator or an approved check airman.
11. Your intentional and repeated operation of N2676B in flights for compensation or hire when you and your aircraft were not operating under the provisions of an appropriate operating certificate and operations specifications of the Federal Aviation Regulations was careless or reckless so as to endanger the lives and/or property of others.

Respondent admitted paragraphs 1-9, but maintained that he did not hold himself out as a Part 135 operator, that he was reasonable in believing the flights qualified as demonstration flights, and that the amounts charged were permissible.

The law judge found respondent and his witnesses credible. It was established through their testimony that, since 1996, respondent had been trying to interest various officials within the Navajo Nation in "FareShare," an idea of joint ownership of aircraft. He had recently purchased a Cessna 340A and was seeking to sell shares in the aircraft, with each shareholder becoming a registered owner. Over time, respondent made presentations about the concept to Navajo Nation officials and several, including the president of the Navajo Nation, became interested in the idea. The passengers transported on the flights at issue were all officials or employees of the Navajo Nation. At the time of those flights, no deal had been struck.

Respondent testified that he believed the flights legitimately were demonstration flights (as referenced in FAR section 91.501), as he was actively trying to interest the Navajo Nation in his FareShare program, and also believed the flights fell under an exemption granted by the FAA to members of the National Business Aircraft Association (NBAA).³ He thought that the amounts he charged were permissible under the regulations and the exemption. The law judge upheld the Part 135 violations,

³The exemption, among other things, applies only to operations listed in FAR section 91.501(b)(1) through (7) and (9). (Exhibit R-1.)

thereby concluding that the flights were carriage of passengers for compensation and thus, regulated by Part 135. He specifically credited, however, respondent's explanation and found that respondent did not believe he needed a Part 135 certificate to undertake the flights. (Tr. at 302.) The Administrator offers us no persuasive reason to disturb the law judge's credibility findings. Unless arbitrary and capricious, the credibility determinations of the law judge will not be disturbed, as he is in the best position to assess witness demeanor. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987).

The law judge dismissed the section 91.13(a) charge, stating that "there was no suggestion that there was anything unsafe about the operation [of the aircraft]." (Tr. at 312.) With this conclusion, we must disagree. Board precedent is clear that a residual violation of FAR section 91.13(a) is warranted in tandem with the Part 135 violations. See Administrator v. Mardirosian, 7 NTSB 561, 563 (1990), aff'd 962 F.2d 14 (9th Cir. 1992) (residual 91.9 violation (now 91.13(a)) upheld where the respondent had violated sections 135.293(a) and (b) and 135.343); Administrator v. Ferguson, 4 NTSB 488 (1982). In Mardirosian, we noted that the Part 135 regulations identified "were promulgated for the express purpose of imposing a high standard of care on those who act as required crewmembers in commercial operations." Id. Operating an aircraft in Part 135 service without having passed the required flight checks is an inherently careless act

(a)

and, as such, supports a violation of section 91.13(a).⁴

Regarding sanction, the law judge changed the revocation to a 30-day suspension. The Administrator argues that the 30-day suspension imposed by the law judge, in lieu of revocation, is inconsistent with law, precedent, and policy.⁵ We agree that the 30-day suspension is not in keeping with precedent; however, we do not believe the evidence supports a finding that respondent lacks the qualifications to hold a commercial pilot certificate.

We are mindful that, under the Civil Penalty Act, the Board is "bound by ... written agency guidance available to the public relating to sanctions to be imposed ... unless the Board finds that any such interpretation is arbitrary, capricious, or otherwise not in accordance with law." 49 U.S.C. § 44709(d). Nonetheless, "it is the Administrator's burden under the [Civil Penalty] Act to clearly articulate the sanction she wishes, and to specifically ask the Board to defer to that determination, supporting her request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law." Administrator v. Peacon, NTSB Order No. EA-4607 at 10

⁴The law judge, in his initial decision, despite his dismissal of the section 91.13(a) charge, stated to respondent, "there were several factors ... that would indicate to me that you hadn't done the appropriate research and the study of the requirements to make the kind of flight you believe you were making." (Tr. at 314.) The law judge's comments appear to support a determination that respondent acted in a careless manner.

⁵The Administrator also argues that the flights were not demonstration flights. This argument is, however, irrelevant since the law judge found them to be flights conducted under Part 135.

(1997). The Administrator offers no Board precedent or information from the Sanction Guidance Table to support revocation in the instant case.⁶

To determine the appropriate sanction, a look at precedent is in order. Sanctions in cases involving the unauthorized operation of flights under Part 135 have fluctuated greatly, depending on the specific facts of each case.⁷ In Administrator v. Briggs, NTSB Order No. EA-4502 (1996), the respondent violated sections 119.5(g) and 61.3(c) by operating several helicopter flights for his brother's logging business without charge. He believed, erroneously, as it turns out, that the flights were not subject to the regulations of Part 135. The Administrator sought emergency revocation of the respondent's ATP certificate, the law judge affirmed the violations but reduced the sanction to an eight-month suspension, and the Board reduced the sanction to a 60-day suspension. In evaluating the appropriateness of the sanction, we noted: "The law judge in effect determined that

⁶She cites only to Application of Briggs, NTSB Order No. EA-4614 at 3, n.3 (1998), an Equal Access to Justice Act (EAJA) case where we discussed whether the Administrator was substantially justified in seeking revocation, i.e., whether the Administrator's legal theory was reasonable, not whether revocation was the appropriate sanction in that particular instance. In the underlying case, an emergency order of revocation of the respondent's airline transport pilot (ATP) certificate was modified to a 60-day suspension. Administrator v. Briggs, NTSB Order No. EA-4502 (1996).

⁷See, e.g., Administrator v. Wagner, NTSB Order No. EA-4081 (1994) (90 days); Administrator v. Carter, NTSB Order No. EA-3730 (1992) (30 days); Administrator v. Hunter, NTSB Order No. EA-3721 (1992) (revocation); Administrator v. Brown, NTSB Order No. EA-3698 (1992) (120 days); Administrator v. Mardirosian, 7 NTSB 561, 563 (1990), aff'd 962 F.2d 14 (9th Cir. 1992) (15 days).

respondent not only had no intent to violate the law, he chose a course he believed was permitted by law. Thus, the necessity for a sanction of strong deterrent value, either for him or for others, would appear to be lacking." Id. at 7, footnote omitted. We also took into account the "quasi-business relationship predicated on both familial obligation and economic opportunity" that was involved, while noting that it was "reasonably clear that nonbusiness factors played a significant role in [the respondent's] decisionmaking." Id. at 8.

Analogies may be drawn between Briggs and the instant case. Respondent, while he admitted charging a fee for expenses which he believed were allowed for a demonstration flight, nevertheless operated the flight at a loss. (Tr. at 191-92.) Further, he repeatedly stated that, as a Navajo man, he was strongly motivated to help the Navajo Nation and saw the FareShare program as a step in that direction. Revocation is not warranted in the instant case.

Nevertheless, the 30-day suspension imposed by the law judge is not an appropriate sanction, given all the facts. For example, respondent admitted that, although he mailed in an application for membership in the NBAA, he merely assumed the NBAA exemption was "comprehensive," but "didn't really research it" and had never read it. (Tr. at 165, 212.) As for the amounts charged for the flights, respondent stated that he thought the FAA inspector with whom he had met to discuss what would be involved in obtaining a Part 135 operator's certificate

would have helped him in figuring out what charges were allowed. (Tr. at 184.) Yet, despite this hope, respondent did not call the inspector or go to the FSDO to discuss the matter. We find troubling respondent's inaction and failure to insure that he understood the applicable regulations. Thus, given the totality of the circumstances and applicable precedent, a 90-day suspension is warranted in this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's Motions to Dismiss are denied;
2. The Administrator's appeal is granted, in part, as to the 91.13(a) violation; and
3. The initial decision and the emergency order of revocation are affirmed, with a modification to suspend respondent's commercial pilot certificate for a period of 90 days.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. FRANCIS, Vice Chairman, and Members HAMMERSCHMIDT and GOGLIA submitted the following concurring statements:

Vice Chairman Francis:

I concur with the decision and increased sanction in this case because of the importance of compliance with the higher standards of Part 135 to ensure safe commercial aviation operations. Despite my concurrence, I note our continued reliance on long-standing Board precedent of the residual nature of a "careless and reckless" violation merely because there is a Part 135 violation. While not prepared to argue against that precedent here, it seems curious to have clear evidence of carelessness – the failure to read and comply with the NBAA exemption under which the pilot claimed to operate – and not rely on it as a basis for violation of FAR 91.13(a).

Member Hammerschmidt:

While I concur in the Board's decision on sanction, I, too, am concerned over the appropriateness of a section 91.13(a) charge, although for somewhat different reasons than those expressed by the Vice Chairman and Member Goglia. I am becoming increasingly persuaded that, notwithstanding our traditional approach to the question, the fact that a flight, or series of flights, was not accomplished pursuant to the enhanced level of safety that Part 135 is designed to provide should not, without more, establish a violation of the "careless or reckless" regulation. For that reason, I am not convinced that we should reverse the law judge's decision on that issue in this case, for there is no showing that the actual flights the respondent operated were not conducted safely.

Member Goglia:

I concur with the increase in the sanction to a 90-day suspension, however, there is no basis for a finding of a violation of Section 91.13(a). There are specific standards for finding a "careless and reckless" violation. To automatically include a violation of Section 91.13(a) as a part of any other regulatory violation, dilutes the independent significance of the "careless and reckless" standard.

11
APPENDIX

§ 135.293 Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas—

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for—

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes

of this paragraph, type, as to a helicopter, means a basic make and model.

§ 135.299 Pilot in command: Line checks: Routes and airports.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly. The flight check shall—

(1) Be given by an approved check pilot or by the Administrator;

(2) Consist of at least one flight over one route segment; and

(3) Include takeoffs and landings at one or more representative airports. In addition to the requirements of this paragraph, for a pilot authorized to conduct IFR operations, at least one flight shall be flown over a civil airway, an approved off-airway route, or a portion of either of them.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 119.5 Certifications, authorizations, and prohibitions.

(g) No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

§ 135.95 Airmen: Limitations on use of services.

No certificate holder may use the services of any person as an airman unless the person performing those services—

(a) Holds an appropriate and current airman certificate; and

(b) Is qualified, under this chapter, for the operation for which the person is to be used.

§ 135.251 Testing for prohibited drugs.

(a) Each certificate holder or operator shall test each of its employees who performs a function listed in appendix I to part 121 of this chapter in accordance with that appendix.

§ 135.255 Testing for alcohol.

(b) No certificate holder or operator shall use any person who meets the definition of "covered employee" in appendix J to part 121 to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

[Amdt. 135-48, 59 FR 7397, Feb. 15, 1994]

legged 3/29/98

88 JUN 1 1998
NATIONAL TRANSPORTATION SAFETY BOARD

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BEFORE THE
UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
Offices of Administrative Law Judges

In the Matter of) VOLUME II
ADMINISTRATOR)
Federal Aviation Administration,)
complainant,)
v)
FRED MEAD TSOSIE,) DOCKET NO:
respondent.) SE-15216
EMERGENCY HEARING

United States Tax Court
Room 235
Federal Building and
United States Post Office
522 North Central Avenue
Phoenix, Arizona

Thursday,
May 28, 1998

The hearing in the above-entitled matter was
convened, pursuant to Recess, at 8:30 a.m.

BEFORE:

WILLIAM R. MULLINS
Administrative Law Judge

ORIGINAL

88 JUN 5 1998
LJ-1

1 APPEARANCES:

2 For the Complainant:

3 NAOMI TSUDA, ESQ.
4 Federal Aviation Administration
5 Western-Pacific Region
6 DOT/FAA AWP-7.10
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8 Los Angeles, California 90009-2007
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7 For the Respondent:

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BEFORE THE
UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
Offices of Administrative Law Judges

In the Matter of)
ADMINISTRATOR)
Federal Aviation Administration,)
complainant,)
v) DOCKET NO:
FRED MEAD TSOSIE,) SE-15216
respondent.) EMERGENCY HEARING

Honorable William R. Mullins

On behalf of the Complainant; Naomi Tsuda, Esc.

On behalf of the Respondent; Kent S. Jackson, Esc.

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board held under the provisions of Section I think 44.709 of the Federal Aviation Act, this is an emergency case, on the appeal of Fred Tsosie from an emergency order of revocation that seeks to revoke his airman's certificate. The order of revocation in this case serves as the complaint and was filed and issued through Regional Counsel of the Western-Pacific Region.

The matter has been heard before me, William R. Mullins. I'm an Administrative Law Judge for the National Transportation Safety Board and pursuant to the Board's

1 rules and as is mandated by the Board's rules, I will issue
2 a decision today. The matter came on for hearing yesterday,
3 the 27th of May of 1998 here in Phoenix. The Administrator
4 was present and represented by staff counsel, Ms. Naomi
5 Tsuda, Esquire of the Regional Counsel's office and the
6 respondent was present at all times and represented by Mr.
7 Kent Jackson of Overland Park, Kansas. Mr. Jackson also is
8 a practicing attorney.

9 The parties were afforded a full opportunity to
10 offer evidence, to call, examine and cross examine witnesses
11 and in addition the parties were afforded an opportunity to
12 make argument in support of their respective positions.

13 DISCUSSION

14 First, this case -- well, all aspects of this case
15 were interesting but the first one that I'll discuss with
16 you is the fact that the Administrator had 11 paragraphs in
17 the order of revocation of regulatory allegations and the
18 respondent admitted the first nine paragraphs. And
19 basically the allegations are that he was making flights for
20 compensation and hire when he did not have a Part 135
21 certificate and they alleged the flights. They alleged the
22 amount charged in those first nine paragraphs and Mr. Tsosie
23 admitted all of those.

24 So this shifted the burden to Mr. Tsosie to show
25 that he was otherwise authorized to make those flights if he

1 didn't have a 135 certificate. So in that regard in this
2 case the respondent put on his testimony first. The
3 Administrator presented her case in chief second and then
4 closing argument, of course, the respondent had first and
5 last opportunities to make closing argument. So in that
6 regard, the case was different.

7 As I said the first nine paragraphs of the
8 regulatory allegation which involved I believe three
9 flights; flights on March 11th, November 24th, December 5th
10 and December 8th, four flights and the amounts charged were
11 all admitted. Paragraph 10 of the Administrator's order
12 states that, he had operated the flights referenced above
13 when he had not obtained an appropriate certificate and then
14 those -- that sub-part A of paragraph 10 and sub-parts B
15 through G all make reference to requirements that are made
16 of people who operate under 135 certificates.

17 So in the sense that the respondent admitted that
18 he didn't have a 135 certificate, he admitted that he hadn't
19 complied with all of those requirements that are set out
20 under the subparagraphs under paragraph 10 except his
21 position was that he was not required to have a 135
22 certificate, did not need a 135 certificate in the
23 operations that he conducted.

24 Paragraph 11 states that, "Your intentional and
25 repeated operations of the aircraft, November 2676 Baker, in

1 flights for compensation or hire when you or your aircraft
2 were not operating under the provisions of an appropriate
3 operating certificate and operation specifications of the
4 Federal Aviation Regulations, was careless or reckless so as
5 to endanger the lives and/or property of others". That's
6 the 91.13 violation.

7 The regulatory violations include FAR 91 -- excuse
8 me, FAR 119.5(g), which states that, "No person may operate
9 as a direct air carrier or as a commercial operator without
10 or in violation of an appropriate certificate and an
11 appropriate operation specification". The next six
12 regulatory allegations all fall under Part 135 and are
13 consistent with the subparagraphs under paragraph 10 of the
14 allegation in that those are all requirements if you have a
15 135 certificate, which includes drug testing, oral testing,
16 competency testing, and so forth.

17 And then the last regulatory allegations is
18 91.13(a) which states that, "No person may operate an
19 aircraft in a careless or reckless manner". What I plan to
20 do is to go through the list of witnesses. I'll just
21 comment briefly on some of their comments. I will make a
22 passing reference to the exhibits. I won't go through the
23 exhibits. There are a number of them. The Administrator
24 had four exhibits and the respondent had 23 exhibits but I
25 won't identify all of those for the record.

1 I would state for the record that I'm going to
2 take FAR 91.501 and mark it as Joint Exhibit 1 and make it
3 part of the record and I state that simply because all
4 emergency cases or almost all emergency cases get appealed
5 and for those people down the road who look at this thing, I
6 think it would probably be helpful, since there are so many
7 references to FAR 91.501 throughout the testimony that it be
8 part of the transcript. And I had stated previously that I
9 could make reference -- that I could take judicial notice of
10 that which I have done, but I'm just putting that in, as I
11 said, as an aid to whoever might have occasion to review
12 this record.

13 (The document referred to was
14 marked for identification as
15 Exhibit Number J-1 and was
16 received in evidence.)

17 The first witness called by the respondent was Mr.
18 Guthrie, who is the aviation safety inspector and the
19 reporting inspector who was involved in this case and he
20 testified not only for the respondent in the respondent's
21 case in chief but also was called again then by the
22 Administrator in the Administrator's case in chief. He
23 testified that some time last fall, and I don't know the
24 specific dates and it's not important, but some time last
25 fall that Mr. Tsosie made application to the Scottsdale FSDO

1 or the Arizona FSDO, the FSDO located here in the Phoenix
2 Arizona for a 135 certificate and that he, Mr. Guthrie, was
3 assigned to that certificate. And as of the filing of this
4 emergency order, that certificate had not been issued.

5 Mr. Guthrie testified also in addition to that
6 sort of exposure to Mr. Tsosie he also did a ramp inspection
7 on March 11th here in the Phoenix area and at that time --
8 and that was one of the flights that was alleged. He
9 interviewed not only Mr. Tsosie but also the passengers who
10 were on board that flight and then later was involved in
11 issuing this revocation notice that was sent out, order.

12 Mr. Tsosie then called Mr. D'Urso who identified
13 himself as an aviation safety inspector operations. When it
14 came out that he was in operations, respondent had no
15 questions of him, so he stepped down. He later was called
16 again in the Administrator's case in chief. The next
17 witness called by the respondent was Mr. Albert Long and Mr.
18 Long is the director -- and if I get these titles wrong, I'm
19 generally, I think close but I believe Mr. Long testified
20 that he was the director of special projects for the
21 Department of Social Services for the Navajo Nation and he
22 testified that he was at some meeting that involved folks
23 from outside of the Navajo Reservation and I'm not sure
24 where the testimony came later but it was later testified
25 that these other people that were at the meeting represented

1 other tribal nations that were at a meeting but in any
2 event, there was a flyer passed out and he identified this
3 flyer which discussed this program that Mr. Tsosie was
4 trying to promote with the Navajo Nation of the FareShare
5 and/or partial ownership of aircraft that he had purchased.

6 Mr. Long testified that he met Mr. Tsosie at that
7 meeting and he had the flyer. A couple of weeks later he
8 had occasion to need air transportation to Phoenix. He had
9 his secretary make arrangements for the aircraft and he, in
10 fact, flew to Phoenix and flew back with Mr. Tsosie and he
11 was very candid in saying that there was no discussion of a
12 demonstration flight at that time. There was no discussion
13 about -- he didn't even know what the fee was going to be.

14 Apparently there was no charge assessed prior to
15 the flight. That charge came later but he was very clear
16 that there was no discussion about this demonstration
17 flight. He believed he was on a charter and that was his
18 testimony.


19 The next witness called was Mr. Fred White who is
20 the director of tourism for the Navajo Nation and Mr. White
21 testified that he was aware of the program of selling shares
22 of the aircraft, that I think it first came out in his
23 testimony that this is a plan that Mr. Tsosie had been
24 presenting to the tribe or the tribal leaders as early as
25 1996 but in any event the concept was to share ownership and

25

1 therefore make aircraft use more feasible than the
2 Department of Transportation with the Navajo Nation, which
3 apparently had been undergoing and it was testified by
4 several of the people who testified, sort of been going
5 downhill. Their budget costs and their loss of revenues to
6 the tribe obviously everyone was experiencing budget cuts
7 but apparently the tribal aircraft department or the
8 Department of Transportation was having this problem, too.

9 Mr. White testified that at the time of his -- I
10 don't know how many trips he was on but one of the trips was
11 with Mr. Notah, who also testified here. Mr. Notah was
12 director of economic development for the tribe, but at one
13 point on the March 11th flight when Mr. Guthrie asked about
14 how much it was costing and Mr. Notah said \$1,000.00 and on
15 cross examination it was asked of Mr. White, "Well, if that
16 wasn't what was going to be charged why didn't you correct
17 him", and his comment was he didn't want to embarrass Mr.
18 Notah and he sort of implied by that that Mr. Notah might
19 not have been in the loop as to the discussions about the
20 arrangements of the flight.

21 But in any event, that was his testimony. The
22 next witness called was Mr. Notah, who is the director of
23 economic development for the Navajo Nation. And if I say
24 tribe I don't want to offend anyone, I mean, nation and I
25 appreciate, and I'll make a comment about that a little bit



1 later, but I appreciate the level of this nation that
2 appeared here in Court, including the president.

3 But Mr. Notah talked about his experience and his
4 awareness of the time share -- not time share but the
5 ownership share program that Mr. Tsosie was trying to
6 promote within the tribe and with his testimony and also Mr.
7 White's several of these exhibits came in and it shows
8 communication that was ongoing throughout the tribe, at
9 least the tribal leaders or the nation leaders, about this
10 program that Mr. Tsosie was trying to start of this cost
11 ownership share, cost distribution program which I think
12 it's clear even by the testimony of Mr. Guthrie and the
13 parties that that certainly is a program that if it goes
14 forward as planned, does not require a 135 certificate.

15 It falls under the NetJet and there was an exhibit
16 about the NetJet organization and some other organizations
17 out in our aviation community who do partial ownership of
18 aircraft and there's no requirement apparently under those
19 and there's no suggestion from the FAA that those programs
20 have to have 135 or commercial operator certificates.

21 The next witness was the president of the Navajo
22 Nation, Mr. Atcitty. He testified here yesterday and it was
23 clear from Mr. Atcitty's comments that he was aware of the
24 FareShare plan that Mr. Tsosie was promoting, had written
25 letters endorsing the program, although I thought it was

1 clear that he did not have an absolute grasp of what that
2 plan encompassed. And if you ask the president of any
3 nation to talk about somebody trying to sell a piece of a
4 Cessna to different departments of the state, I doubt that
5 any president, any governor of any state could be very
6 explicit about the exact details and I was impressed not
7 only by his testimony but by the other people's testimony
8 because it was clear, for example, Mr. Long, I mean, for the
9 respondent to call Mr. Long was almost tantamount to
10 shooting one's self in the foot, because he absolutely
11 didn't know anything about demonstration flights and he was
12 very clear about it.

13 And he said he thought it was a charter and I
14 appreciated his testimony and I thought that the other
15 leaders of the Navajo tribe that testified were equally
16 credible in the testimony that they presented.

17 Then Mr. Tsosie testified and I thought -- I share
18 this comment with you, Mr. Tsosie, and I hope this doesn't
19 offend you but I listened. I grew up ⁱⁿ ~~at~~ Oklahoma and I
20 spent many years there as a District Judge and I had
21 dealings with all of the Oklahoma Indian Tribes or many of
22 them and it was very clear that the tribal leaders who
23 testified here today were tribal leaders and they testified
24 the way that I would expect Indian Nation leaders to
25 testify.

1 The question was asked and there was no immediate
2 response and they sat and they thought through those
3 questions and then I thought their answers were articulate.
4 I think your answers were articulate but you didn't think
5 through the answers. I mean, you kept coming back and an
6 example was you kept going uh-huh. And I noticed at one
7 point you wrote down yes so you'd say yes when it was
8 pointed out to you but it was obvious that you haven't spent
9 all your life on the tribe, on the reservation as these
10 other gentlemen have.

11 And likewise, Ms. Rozak, she was very quick with
12 her answers. I gathered that she has spent a great deal of
13 time outside of the reservation. But I understand that
14 that's the way those things go. But in any event, Mr.
15 Tsosie testified last and his testimony sort of put together
16 all of these efforts that he had made over the last two or
17 three years to create this program called FareShare of
18 selling pieces of his airplane to different entities within
19 the Navajo Nation and there was several exhibits about that
20 and I thought it was clear from his testimony, there was
21 even a document, one of the documents was a legal opinion by
22 the Department of Justice of the Navajo Nation that thought
23 that this FareShare thing did not require a 135 certificate.
24 But in any event, I believe that Mr. Tsosie
25 believed that he didn't need a 135 certificate to do what he

1 was doing and that was his testimony.

2 Then the complainant's case in chief, Ms. Rozak
3 was called first and that was late last evening but she
4 testified that she made one of these flights. No one ever
5 mentioned to her that it was a demonstration flight. An
6 exhibit was handed to her which shows that someone within
7 their organization perhaps had been briefed about Mr.
8 Tsosie's attempts to set up this FareShare program; however,
9 she said she had never seen it although she was listed as
10 one of the addressees. But in any event, that was withdrawn
11 or it certainly wasn't offered.

12 But she, on the trip that she made, did not -- she
13 testified there was no comments made to her about
14 demonstration flight. I am going past -- and I want to just
15 mention this in comment. Several people talked about the
16 lack of the safety briefing. I'm going past that and I'm
17 not going to put any stock in that one way or the other
18 because; one, it's not an allegation in this case and; two,
19 there was no requirement under the demonstration flight that
20 I know of -- if there would have been -- there would have
21 been a requirement for it under 135 flight and, of course,
22 that's not the issue before me.

23 The issue is whether or not it should have been a
24 135. Then Mr. D'Urso was called and he testified about this
25 safety briefing but he said everything about the aircraft

1 was okay. Mr. Guthrie was called again. Mr. Guthrie
2 testified about the comments that Mr. Notah had made about
3 the \$1,000.00 charge and then later when they went back to
4 the airplane that figure had been changed from \$1,000.00 to
5 300, I think he said 300 to 350. And it was his impression
6 that they had gotten together and discussed that so they
7 could change their story.

8 There was nothing in the evidence, the testimony
9 from Mr. Guthrie that would indicate that these people knew
10 that he was going to be back out there when they came out or
11 if there was, I certainly didn't hear it. Another thing,
12 Mr. Guthrie provided some figures that he had calculated the
13 expense that would have been allowable under the Part 91
14 which was, I think, subparagraph (d) of 91.501, FAR 91.501
15 and I had asked him about the cost, the salary figures and
16 he said that the salary of the pilots was not one of the
17 factors that you could consider under 91.501 and that was
18 consistent with Ms. Tsuda's cross examination of Mr.
19 Tsosie's calculations in this aspect.

20 So those were the witnesses. As I said, there
21 were a number of exhibits. I'm not going to go through
22 them. A lot of those exhibits are communication that was
23 ongoing throughout the Navajo Tribe, Nation, concerning this
24 FareShare, the endorsements it was receiving, not only from
25 the former president, Mr. Hale, but the current president

1 who testified here today, the several directors, including
2 Mr. Notah, of course, Mr. White and there were a couple of
3 other people whose names were on these pieces of
4 correspondence.

5 Let me go through and tell you what I thought were
6 some of the keys here for me. First, there is just no clear
7 definition anywhere in the FAR's about what is a
8 demonstration flight. Mr. Guthrie testified that he didn't
9 think it could include transportation of people from Point A
10 to Point B for purposes other than just a demonstration
11 flight. There's nothing that I saw in any regulations or
12 suggestions that said you can't do that. Certainly if I
13 were in Mr. Tsosie's position I'd -- you know, there's
14 nothing that would suggest to him that there was some sort
15 of prohibition on that sort of flight.

16 There seems to be and it's suggested by some of
17 the cases that every person on board the flight has to be
18 briefed as to whether or not it's a demonstration flight
19 versus in this case whether or not if the tribal/nation
20 leaders are aware that there is this program going on and
21 the program is being attempted to be sold to the nation, if
22 there has to be under the regulation a requirement that each
23 individual who's using this air service needs to know since
24 it appeared under the evidence here that -- well, it was
25 clear under the evidence here that all of these flights were

1 for the Navajo Nation and then the question is, as long as
2 the nation leaders were aware of it, do the individual
3 passengers have to be briefed on it, that's not clear.

4 It's not clear about what the billing requirements
5 are. Certainly the bills submitted by Mr. Tscsie to these
6 folks at least the first few bills just said for aircraft
7 services. It didn't mention demonstration flight. Is the
8 bill required to have demonstration flight? I suppose if
9 you take it one step farther, you might have to have a
10 written statement from every person that sets foot on the
11 airplane that they have been briefed, that they understand
12 it's a demonstration flight, that they have received this,
13 they have received that and have them sign it and then, I
14 guess you could take it a step farther and have it
15 notarized. I mean it's just not clear what the requirements
16 are under this Part.

17 And again, as I said, it's not clear whether it
18 can be coupled with other purposes, transporting people from
19 A to B. So there's a lot of gray area out here that is not
20 clear. In fact, if you read the cases from the Safety Board
21 it's not clear because the Safety Board, each case -- you
22 have to deal with each case I guess would be the best way to
23 characterize it, and so that's -- that was kind of the
24 underlying thing here throughout all of this evidence.

25 It was clear from the evidence that there has been

1 an ongoing program by Mr. Tsosie for some time, two years
2 maybe, to develop and sell to the Navajo Nation and the
3 different departments of the Navajo Nation this FareShare
4 plan and I think it was also clear under the evidence that
5 if the plan goes through as proposed, then under these other
6 activities that are ongoing across the country the NetJet
7 plan and so forth, that there would be no requirement for an
8 Part 135 certificate.

9 But as I said it was clear that this program has
10 been ongoing for some time and all of the leaders of the
11 Navajo Nation not only through the exhibits but the leaders
12 who testified here were aware of the plan and it's not just
13 something like in the Wagner case it was dreamed up the
14 night before one of these flights was originated.

15 Another key for me was the fact that the Navajo
16 leaders came here and testified and I know they were under
17 subpoena but still, I think they could have easily gotten
18 out of those subpoenas and I know through me reading and the
19 brief exposure that I had with the tribal nations growing up
20 in Oklahoma that the Navajo Nation is one of the largest and
21 one of the most sophisticated from the standpoint of their
22 government. I think they, in a sense, probably are an
23 example for the other tribal nations in the way that they
24 would like to run their government, but I consider Mr.
25 Atcitty, who testified here, as comparable to any state

1 governor who would have had occasion and I was not only
2 impressed by all of those folks who testified here today and
3 yesterday but I felt like their answers were very credible.

4

5 In fact, I don't -- in assessing credibility, I
6 don't -- I think everyone who testified here today was
7 credible. I think there were some mistakes made, but you
8 know, that doesn't -- I don't think there was any distortion
9 of what those individuals believed as they testified.

10 Another key for me was Mr. Long's testimony and I
11 mention that briefly. He was very candid about there was no
12 talk of a demonstration but also I think it came out and the
13 testimony was unrebutted that when he said that there were
14 other people at this meeting that received this flyer about
15 FareShare, he knew only that they were not necessarily
16 Navajo Nation individuals but I think the evidence was clear
17 that these were people from other tribes and these were also
18 people, leaders from other tribes, also people that Mr.
19 Tsosie was targeting with his FareShare plan.

20 So the fact that he was passing out these
21 FareShare things in no way represented to me that he was
22 holding himself out as a charter operation. In fact, the
23 only evidence that there was any holding out was this one
24 exhibit which there was some suggestion that there was going
25 to be some testimony later that this had been disseminated

1 in the public but no one who testified here today or
2 yesterday testified that they had ever read anything or seen
3 anything where Mr. Tsosie was holding himself out as a
4 charter operator and I think that was important.

5 There was this one flyer but it was testified to
6 by Mr. Tsosie that it was something that they had come up
7 with in anticipation of this 135 certificate coming out and
8 it didn't -- the 135 certificate had not been received.

9 Let me comment about the 135 certificate. Mr.
10 Guthrie testified that one of the problems he was having
11 with the 135 certificate is that Mr. Tsosie's resume did not
12 include flight times, pilot in command, captain, 135 versus
13 other types of experience and one of the problems I had -- I
14 didn't have a problem with that but one of the questions
15 that comes to my mind and I'll be blunt with you, it's not
16 relevant to my decision today, but if he received that with
17 the application, and this is eight months later, I mean, why
18 wasn't -- when you got the resume, why didn't you raise a
19 question?

20 It raises a question to me, you know, why do these
21 135 certificates take so long particularly since it's just
22 one pilot and one airplane. And the other thing, and I
23 suppose if there was any bottom line that I would suggest to
24 you, Mr. Tsosie, is that if you spend \$400,000.00 for an
25 airplane that you're going to run under a certificate from

1 the FAA, then you ought to take 10 percent of that amount
2 and spend it on consulting fees to get the thing through the
3 FAA.

4 And if you spend \$30,000.00 on an airplane, you
5 ought to spend 3,000. I think 10 percent is a fair share
6 and I see these issues come up in all these cases. And a
7 classic example, I'll just comment on this right now because
8 I think it's very clear of this whole case, the suggestion,
9 the questions from Ms. Tsuda on cross examination of the
10 respondent were that salary, pilot's salaries are not an
11 appropriate consideration in computation of these fees that
12 you can charge under 91.501. Mr. Guthrie testified today
13 that you cannot charge pilot salaries for this but I'll read
14 from the trial brief.

15 "The FAA gave the following information about
16 demonstration flights in promulgating 91.501", and then
17 there's a quote that according to this appears in the
18 Federal Register. It says that the preamble to this notice
19 of proposed rule making was issued by the FAA to make it
20 clear that a manufacturer or aircraft sales company did not
21 need a commercial operator's certificate to demonstrate
22 aircraft in flight to a prospective customer when that
23 customer is charged a fee to defray the normal operating
24 expenses of the flight including fuel, oil, hangar or
25 landing fees and salary of the flight crew", i.e. the folks

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1 here today said that you can't count salary but it appeared
2 in the Federal Register that you could count salary as part
3 of this.

4 Again, it's just an example of how unclear and how
5 muddled up this water is and even the different levels of
6 the FAA don't understand or at least they're not consistent.
7 They may understand at each level but they're not
8 consistent. And that's why I say, if you spend \$400,000.00
9 for an airplane, I think you're foolish if you don't spend
10 10 percent of that amount just to make sure that you don't
11 run afoul of any of these things and it may be that you do.

12 What if the notice of proposed rule making said
13 you couldn't charge for salary and the local folks said you
14 could, and then the local folks move on down the road and we
15 get some new local folks and then you might get dinged for
16 that. So there's no guarantee even with the consulting fee
17 I'm suggesting.

18 Another key in this case and I thought it
19 absolutely is the way things work if you think about it was
20 Mr. White's comments about he didn't want to correct Mr.
21 Notah because he didn't want to embarrass him in front of
22 these representatives of another nation. That was
23 inherently credible to me. And at the same time, I can see
24 that once they got away from the FAA that Mr. White probably
25 went up to Mr. Notah and said, "Look, I don't know where you

1 got that \$1,000.00 figure but, you know, here's the deal",
2 and so when they come back, they've got a different figure
3 they present to Mr. Guthrie. But as I said previously,
4 there was no indication that from Mr. Guthrie or the
5 evidence that he was going to be back. So it's not like
6 they were changing their story. It was like they were
7 getting coordinated.

8 Another comment that I'll make and I'm not sure
9 what this means but there were time gaps. I've mentioned
10 the time gap between your application for one pilot and one
11 aircraft 135 certificate that's gone on for many months but
12 also on the part of respondent, there was a period of
13 time -- apparently the aircraft was purchased in early 1997
14 and why an application and/or the application for the
15 National Business Aircraft Association wasn't made sooner
16 than that and I don't understand those gaps in time.

17 I do know what the interest would run on a
18 \$400,000.00 loan every month and that's not insignificant at
19 all. Finally, I guess a last comment I'd make and then I'll
20 just get onto my findings. Specifically I'm going to find
21 that there was not 91.13 violation and my basis for making
22 that finding is two-fold. First of all, in all of this
23 operation there was no suggestion except for the emergency
24 door thing that there was no suggestion that there was
25 anything unsafe about the operation.

1 The aircraft apparently was in good maintenance
2 condition. You held the certificates that were required and
3 so throughout those operations there was nothing that
4 indicated a 91.13 violation. And equally as important for
5 me was the fact that Mr. Guthrie, after he briefed your
6 folks on March 11th that it wasn't a charter and that you
7 couldn't charge for it, but his testimony was that he told
8 those people, "But it's okay for you to get on the airplane
9 and go back to Window Rock", I guess that's where you're
10 from, on the airplane. And certainly if there was a 91.13
11 issue, he wouldn't have done that or I hope he wouldn't have
12 done that.

13 All right, the bottom line for me is first, I
14 believe that Mr. Tsosie believed that he was operating
15 legally under the demonstration flights under 91.501 and
16 this NBAA exemption. I think the testimony not only from
17 Mr. Tsosie but from the other people that he was trying to
18 sell this share operation to made it clear that he believed
19 that, but I'm also finding that his belief fell short of
20 complying with that exemption. He hadn't complied with
21 notification to the FAA, although there was some indication
22 that Mr. Guthrie was gone for a long period of time there,
23 but there was no suggestion that there was any attempt to
24 contact him during this period of time.

25 There was no waiting on the receipt of an NBAA

1 membership. There was just the sending of the money. There
2 was no briefing of the individual passengers, and I'm not
3 suggesting that that's a requirement but there were several
4 factors including those I've just suggested to you that
5 would indicate to me that you hadn't done the appropriate
6 research and the study of the requirements to make the kind
7 of flight you believe you were making. And so, therefore, I
8 find that you were in regulatory violation of FAR 91 --
9 excuse me, FAR 119.5(g) and then the different regulatory
10 violations alleged under FAR 135 but I certainly don't
11 believe that there was established under the evidence or the
12 admissions any showing of lack of qualifications to hold a
13 certificate.

14 In fact, sometimes these things develop steam of
15 their own but I believe that -- I really believe that if the
16 Administrator had had the input from the Navajo Nation that
17 I have received that this would never have proceeded as an
18 emergency revocation and there -- unfortunately or maybe
19 fortunately, depending on how you look at it, there's
20 legislation ongoing for the United States Congress to put
21 some ~~brakes~~ ^{brakes} if you will, or certainly some speed brakes on
22 this emergency authority and maybe those issues -- if that
23 legislation goes through, those issues might have been
24 surfaced to get this out of the category of an emergency
25 revocation and would have proceeded, perhaps on a

1 suspension.

2 I think under the evidence that there has not been
3 shown any egregious violation. I think you believed that
4 you were complying but the facts are that you were not and I
5 think an appropriate sanction in this case and under those
6 violations would be a 30-day suspension of your airman's
7 certificate and that will be my order.


8 ORDER

9 IT IS THEREFORE ORDERED that safety in air
10 commerce and safety in air transportation does not require
11 an affirmation of the Administrator's emergency order of
12 revocation as issued. Specifically I find that there has
13 been no showing of lack of qualifications of this
14 individual. There has been no showing of regulatory
15 violation of FAR 91.13(a). I find that there was
16 established by a preponderance of the evidence the
17 regulatory violation of FAR 119.5(g), 135.95(b), 135.251(a),
18 135.255(b), 135.293(a) and 135.293(b) and I find under this
19 evidence that's been presented yesterday and today that an
20 appropriate sanction in this case would be a 30-day
21 suspension of your airman's certificate and it will be so
22 ordered.

23

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WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE

1 JUDGE MULLINS: Mr. Tsosie, you have the right to
2 appeal this order and you may do so by filing your notice of
3 appeal within two days of this date. You have certain
4 rights. Then within seven days of this date you need to
5 file a brief with the National Transportation Safety Board
6 Office of General Counsel. I'd ask Mr. Jackson, if you'd
7 come up, I'll hand you a written statement of those rights
8 to appeal.

9 The Administrator is entitled to appeal this order
10 today and if you'd like, I can give you a copy of this
11 also --

12 MS. TSUDA: Thank you, your Honor.

13 JUDGE MULLINS: -- which sets forth where -- the
14 times for appeal and where the briefs and so forth go. Mr.
15 Jackson, do you have any question about the order?

16 MR. JACKSON: I have one question, sir. Would the
17 30-day suspension include time served so to speak?

18 JUDGE MULLINS: Yes, and I think that's automatic
19 if the suspension has been surrendered in these emergency
20 cases.

21 MR. JACKSON: Just wanted to confirm.

22 JUDGE MULLINS: Right. Any question from the
23 Administrator?

24 MS. TSUDA: No.

25 JUDGE MULLINS: All right, thank you, folks. I

1 thought it was well-tried and thank you for the tribal
2 leaders who were here today and for those who have already
3 gone. I appreciate their time and interest in this case.
4 The hearing is terminated.

5 (Whereupon, at 11:30 a.m. the hearing in the
6 above-entitled matter concluded.)
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SERVED: July 9, 1998

NTSB Order No. EA-4682

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of June, 1998

Petition of)

ELMER ALLEN PROPST)

for review of the denial by)
the Administrator of the)
Federal Aviation Administration)
of the issuance of an airman)
medical certificate.)

Docket SM-4244

ORDER DISMISSING PETITION

On March 16, 1998, we ordered the Administrator to show cause as to why we should not construe the Federal Air Surgeon's failure to act on petitioner's August 21, 1996 application for an airman medical certificate as a final denial. NTSB Order No. EA-4642. On April 7, 1998, the Administrator advised the Board that the Federal Air Surgeon had issued a final denial of that application on December 2, 1997, and that petitioner's petition for review of that denial had been separately docketed in the NTSB Office of Administrative Law Judges as SM-4284.¹

Petitioner has filed a reply, urging the Board to not dismiss this petition. He asserts that substantive issues concerning his medical qualifications and the legal issue of *res judicata* still remain. We believe those issues are more properly left for resolution in the challenge to the Federal Air Surgeon's final denial that has been docketed as SM-4284.

¹This information should have been immediately submitted for inclusion in this docket.

UK

ACCORDINGLY, IT IS ORDERED THAT:

The instant petition is dismissed as moot.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.

SERVED: July 16, 1998

NTSB Order No. EA-4680

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of July, 1998

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

CRAIG FROST,

Respondent.

Docket SE-14781

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on July 9, 1997, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, on finding that respondent had

¹ The initial decision, an excerpt from the hearing transcript, is attached.

violated 14 C.F.R. 91.7(a) and 91.13(a).² The law judge, however, reduced the Administrator's 90-day proposed suspension to 50 days, on accepting the Administrator's withdrawal of a charge, and the law judge's finding that two other charges were not proven. We grant the appeal and dismiss the complaint.

Respondent was the pilot-in-command of a February 4, 1996 helicopter flight from Las Vegas, NV to Boise, ID, at which location he left the aircraft for maintenance. On March 4, 1996, FAA airworthiness inspector Ricardo Domingo inspected the aircraft, and testified to finding many unairworthy items, as listed in the complaint. The discussion that follows addresses each allegation (count) of the complaint that was affirmed by the law judge.

1. *The aircraft is not airworthy if its flight manual does not contain a permanent revision control page.* When Mr. Domingo did his inspection, he failed to locate a permanent revision control page in the flight manual. The manual itself, current and complete, is required to be in the aircraft by the type certificate.³ The law judge reasoned that, without the revision

² Section 91.7(a) prohibits operation of unairworthy aircraft. Section 91.13(a) prohibits careless or reckless operations. If the first charge is proven, the second is automatic, being a residual charge to an operational violation. See Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there.

³ Accordingly, the aircraft must contain a current manual for the aircraft to be airworthy. See Administrator v. Copsey, NTSB Order EA-3448 (1991) at 5 (test for airworthiness not only "flyability." The aircraft must be in conformance with its type

page, it would be impossible to know if the manual was complete. We disagree. The existence or nonexistence of the revision page says nothing about whether the manual is complete. The revision page could be there, and the manual still be incomplete. Likewise, there are other ways to determine if the manual is complete.

Overall, the Administrator did not establish that the revision page was actually a required part of the manual, or was simply a handy tool or reference item, not formally a part of the manual. Nor did he establish that the manual itself was in some substantive manner incomplete or out of date, so as to violate the type certificate and make the aircraft unairworthy. Accordingly, we dismiss this portion of the complaint.

2. *The aircraft is not airworthy if the turbine outlet temperature gauge does not have a red line at 793 degrees C.* The Administrator claimed, and the law judge found, that this gauge did not have the red line required by the flight manual showing the temperature limit. Our view of the gauge itself, which was introduced as evidence, leaves no doubt in our minds that respondent's position is accurate: there is a large line where a large red line should be, but its color has faded, just as the red "off" label on the gauge had faded. The tone, however, is red, not yellow. We have held that not every minor defect

certificate and in condition for safe flight, citing Administrator v. Doppes, 5 NTSB 50, 52 (1985)).

requires a conclusion that the aircraft does not conform to its type certificate and therefore is unairworthy. See Administrator v. Calavaero, 5 NTSB 1099 and 1105 (1986). The faded line in this case is akin to the types of damage we considered in that case. As we said there,

In this case the Administrator essentially made no effort to show that the alleged defects or discrepancies had had an adverse impact on the level of safety that an aircraft's conformity with its type certificate is intended to insure...

Id. at 1101. Normal wear and tear such as this, if not adversely affecting safety, is not considered an airworthiness violation.

3. *The aircraft was not airworthy because the dual tachometer did not have a yellow caution range from 50-60% NR, as required by the flight manual.* The Administrator's FAA witness testified that there was no colored yellow caution arc marked on the gauge between 50 and 60 when he looked at the aircraft in March. Respondent replied with a written statement from the current owner of the aircraft to the effect that the yellow arc is on the gauge, and the gauge had not been replaced since his purchase. The law judge, crediting the FAA testimony with greater weight, affirmed this violation.

The standard for airworthiness violations for pilots is not, however, one of strict liability. Thus, even accepting that the gauge lacked a required arc, we have held that pilots are subject to a reasonableness standard: did respondent know or should he have known that this colored arc was required. Administrator v. Parker, 3 NTSB 2997, 2998 (1980). The Administrator proved

neither in this case. All the Administrator proved was that the arc was missing. Respondent did not testify about whether he knew or did not know if a yellow arc was required on the gauge. To establish what a respondent could be expected to know (as opposed to what he actually did know), we have reviewed his experience. See, e.g., Administrator v. Doppes, 5 NTSB 50 (1985) at 53 ("Respondent's extensive background and credentials, including certification on the DC-3, DC-4, DC-8, Lockheed Constellation, Boeing 707, 727, 747, and others, and his 12,000 hours of pilot flight time, together with his maintenance experience, all indicate to us that respondent was aware, or should have been, that the aircraft was not airworthy"). There is no evidence in this case on this point.⁴ Thus, this charge must be dismissed.

4. The aircraft was not airworthy because placards *describing an added fuel extender were not installed on the instrument panel and the baggage compartment*. Our conclusion here is similar to that regarding the tachometer. The Administrator did not establish that respondent knew or should have known that these placards were required, only that they were missing. We hesitate to impute to all pilots, regardless of background, the responsibility of knowing details such as these,

⁴ Further, we would question the reasonableness of requiring all pilots to know the marking requirements of all cockpit equipment, as the Administrator's position would appear to require, especially when there is no concurrent allegation or implication of unsafe operation. See Calavaero, infra.

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especially when it has not been established that there actually was a weight and balance problem with the aircraft, as the Administrator has alleged. Compare Administrator v. D'Attilio, NTSB Order EA-3237 (1990) (pilot who is also a mechanic should be held to a higher degree of care when airworthiness is an issue). In this regard, we would note that a premise of the Administrator's case is that the lack of placards requires a finding of a weight and balance violation. This logic escapes us. While the placards may well be required, there is no proof that the lack of them created any safety problem. Indeed, the Administrator admitted there was no evidence that the weight and balance documentation *had not been* updated to reflect changes/additions to the aircraft equipment, including the fuel extender. Tr. at 168. Respondent's exhibits indicated, in fact, that maintenance personnel, when effecting the equipment changes, had modified the weight and balance.⁵

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's complaint is dismissed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁵ In light of our conclusions, there is no need to address respondent's allegations that the condition of the aircraft on February 4, 1996, may not be determined from the inspection 1 month later.

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BEFORE THE

NATIONAL TRANSPORTATION SAFETY BOARD

- - - - -X

In the Matter of: :

ADMINISTRATOR, FEDERAL :

AVIATION ADMINISTRATION, :

Complainant, :

- v -

: Docket No.:

CRAIG FROST, : SE-14781

Respondent. :

- - - - -X

The above-entitled matter came on for
hearing, pursuant to notice, before Patrick G.
Geraghty, Administrative Law Judge, at 601 East Sharp,
Spokane, Washington 99202, in the Moot Courtroom,
Second Floor, on Wednesday, July 9th, 1997, at 9:30
a.m.

APPEARANCES:

On behalf of the Complainant:

PETER R. LAYLIN

Federal Aviation Administration

Northwest Mountain Region

1601 Lind Avenue, S.W.

Renton, Washington 98055

1 APPEARANCES (Continued):

2 On behalf of the Respondent:

3 MARK J. CONLIN

4 421 West Riverside, Suite 911

5 Spokane, Washington 99201

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DECISION AND ORDER

JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the Appeal of Craig Frost, hereinafter Respondent, from an Order of Suspension which seeks to suspend his Airline Transport Pilot's Certificate for a period of 90 days.

The Order of Suspension serves herein as the Complaint and was filed on behalf of the Administrator, Federal Aviation Administration, who is the Complainant herein.

The matter has been heard before this Administrative Law Judge, and as provided by the Board's Rules of Practice, I am issuing a Bench Decision in the proceeding.

1 Following due notice, the matter was called
2 for trial on July 9, 1997 in Spokane, Washington. The
3 Complainant was represented by one of its Staff
4 Counsel, Peter Laylin, Esquire, of the Northwest
5 Mountain Region. The Respondent was present at all
6 times and was represented by his attorney, Mark J.
7 Conlin, Esquire, of Spokane, Washington.

8 The parties were afforded full opportunity to
9 offer evidence, to call, examine and cross-examine
10 witnesses, and to make argument in support of their
11 respective positions.

12 AGREEMENT

13 By pleading, it was agreed there was no
14 dispute as to the allegations contained in paragraph 1
15 of the Complaint. Therefore, those matters are taken
16 as having been established for purposes of the
17 decision.

18 DISCUSSION

19 I intend to just briefly review the evidence
20 herein and follow, essentially, the Complaint, because
21 the evidence as it pertains to these is quite
22 straightforward in my view.

23 Before turning to that, I would simply
24 observe that the suspension sought by the Complainant
25 is predicated upon allegations that the Respondent, as

1 consequence of a flight which occurred on February 4,
2 1996, allegedly, when he was acting in pilot in
3 command, also allegedly, that the Respondent did
4 operate in regulatory violation of Section 91.7(a) ^{IV} and
5 that he operated a civil aircraft when it was not in
6 airworthy condition by reason of several factors set
7 forth in the Complaint.

8 It is further alleged that the Respondent
9 consequently also is in regulatory violation of Section
10 91.13(a) of the regulations and that he operated the
11 aircraft in a careless or reckless manner so as to
12 endanger the life or property of others. In my view,
13 there is no evidence herein that would support a charge
14 of recklessness, so I view that as, portion of the
15 charges, as simply alleging operation in a careless
16 manner.

17 Also observing, before I discuss the evidence
18 and some reform, that the Complainant at the beginning
19 of the case moved to strike subparagraph (d) of
20 Paragraph 3 of the Complaint, and that was done on said
21 motion, and, therefore, the factual allegation
22 contained in that enumerated subparagraph is no longer
23 before me.

24 The first issue is whether or not the
25 Respondent, in fact, was operating as a pilot in

1 command -- excuse my voice -- on February 4, 1996 of
2 the Bell 206 helicopter, November-58003, on a
3 passenger-carrying flight from Las Vegas to Boise,
4 Idaho.

5 Mr. Wyman testified that he had gone to Las
6 Vegas at the request of the Respondent, and that, he,
7 Mr. Wyman, was aboard the aircraft on the date charged
8 in the Complaint and that the flight was in fact
9 performed from Las Vegas back to Boise, Idaho. Boise,
10 Idaho being the location of the maintenance and repair
11 facility that Mr. Wyman owns under the name of Western
12 Airways.

13 Mr. Wyman testified that during the conduct
14 of the flight, that the Respondent was in fact the
15 pilot-in-command.

16 There were only two people on the aircraft.
17 As to any contradiction of the testimony of Mr. Wyman,
18 there was none offered by the Respondent himself as to
19 anybody else being the pilot-in-command. The closest I
20 have is that Mr. Wyman indicating he, in fact, is also
21 a rated helicopter pilot, and simply stating on cross-
22 examination he didn't recall if he flew part of the
23 flight or not.

24 That is not saying that he was pilot-in-
25 command. As a rated pilot, he could have been sitting

1 in the aircraft and flew part of the flight for 15, 20,
2 30 minutes. While he was so manipulating the controls,
3 he could have been pilot-in-command of that portion of
4 the flight. But the Respondent also, if he was flying,
5 he could have been pilot-in-command.

6 In any event, the evidence, as far as I am
7 concerned, supports the conclusion which I reached,
8 that the Respondent did in fact operate on the date
9 alleged in the Complaint, as pilot-in-command of the
10 aircraft, a Bell 206-B helicopter, November-58003.

11 There was testimony by Mr. Ware as to how the
12 FAA got involved in this. Apparently through a
13 question concerning placing a Lear aircraft on a
14 certificate held by the Respondent, and then there was
15 a question raised about this particular helicopter.

16 There is no question in my mind but the
17 helicopter did come back to Boise on February 4th. The
18 inspection by the FAA of this helicopter, according to
19 Mr. Domingo, took place on March 4th, so we have about
20 a month's time. Mr. Wyman testified that the aircraft,
21 after it was brought back, sat outside his hangar for a
22 couple of days, and then after it was washed, it was
23 placed inside his hangar. Mr. Wyman testified that the
24 aircraft is surrounded by a perimeter fence and that
25 this hangar is locked after everybody departs.

1 There is no evidence in front of me that
2 anyone else either flew this helicopter or in any way
3 did anything to the helicopter to change any of the
4 interior configurations or anything else during that
5 one month period of time. To show that there was a
6 change in condition, that is an affirmative defense and
7 the Respondent simply has not sustained that, and I so
8 conclude.

9 As to any work being done on this helicopter,
10 C-1 is a letter from Mr. Wyman to the Respondent
11 talking about delays that had occurred in December of
12 1995 and how much further delay there would be getting
13 work done on this particular helicopter. In that
14 letter, Mr. Wyman states that no maintenance or other
15 work has been started on this aircraft. The date of
16 that letter is March 20, 1994. So I consider that as
17 indicating that nothing actually had been done to this
18 aircraft other than the power-washing, which ^{such} a washing
19 of the exterior is not going to affect any of the items
20 pertinent in this complaint, and I reached that
21 conclusion.

22 Mr. Domingo testified that he inspected the
23 aircraft personally on March 4, 1996, as I have already
24 indicated. And before I look at that, however, I would
25 also observe that Mr. Wyman, in his testimony, stated,

1 and wasn't contradicted, that he, Mr. Wyman, had not
2 thrown away any manuals or documents pertaining to this
3 aircraft, or that he could recall any such documents or
4 manuals being removed by any personnel at Western
5 Airways.

6 There is a memorandum from Mr. Ware that
7 talks about some document being misplaced or lost.
8 However, other than that document, it does not appear
9 that there has been any change in the documents that
10 were available in the aircraft at the time, February 4,
11 1996, and at the time that it was looked at by Mr.
12 Domingo on March 4th, 1996.

13 3(a) of the Complaint alleges that the
14 aircraft was unairworthy because there was no permanent
15 revision control page in the approved flight manual as
16 required by the type certificate data sheet. The Type
17 Certificate Data Sheet, which was Exhibit C-3, does
18 require the approved flight manual. FAR 91.9(b)(2)
19 requires that there be a current approved flight
20 manual.

21 Mr. Domingo testified that at the time he
22 looked at the aircraft flight manual, which he found in
23 a hatrack in this aircraft, that he could not find a
24 current revision sheet, and that, in his view, without
25 a current or permanent revision sheet, one would not be

1 able to tell whether or not the flight manual was
2 current. As he testified, I couldn't establish
3 currency of the revisions without the revision sheet.
4 So if the revision sheet is not there, there is no way
5 of satisfying the requirement of 91.9(b)(2).

6 And so I find the evidence does show that, in
7 my view, the preponderance being that a permanent
8 revision control page was not available. Respondent's
9 testimony, which is the only testimony dealing with
10 this, is that it was his recollection that there was a
11 permanent revision page in the manual on February 1996.
12 As I have already indicated, in my view, there is
13 nothing to show that anything had changed between
14 February 4 and March 4. I attach the credibility
15 assessment, if one attaches that, to the statements of
16 Mr. Domingo as to what he found on the date in
17 question.

18 3(b) deals with the turbine outlet
19 temperature gauge. He testified that it did not have a
20 red line at the limitation max of 793 degrees
21 centigrade, which is required by the aircraft flight
22 manual. There is no question but that that marking is
23 in fact required by the flight Manual.

24 Mr. Domingo stated that when he looked in the
25 aircraft, that he was not able to discern a red line,

1 rather that all he saw was a yellow line.

2 On the other hand, Exhibit R-2, which was
3 received as the gauge that was installed in the
4 aircraft, was offered with the argument and the
5 testimony of Mr. Randels, who appeared on behalf of the
6 Respondent, that it is, in fact, a faded red line.

7 I have looked at this several times and in
8 different lights, and my conclusion, looking at this,
9 is that it appears to me that this arc ends with a
10 yellow line, not with a red line. And so, based upon
11 Mr. Domingo's testimony, my personal observation of the
12 gauge is that there is no red line marking, it simply
13 is a yellow line, and I make that conclusion. I,
14 therefore, find that the allegation in 3(b) is
15 established.

16 3(c) alleges that the dual tachometer did not
17 have a yellow caution range from 50 to 60 degrees NR as
18 required by the Flight Manual. Again, that requirement
19 is spelled out clearly in the Flight Manual.

20 There was exhibit not only of the requirement
21 for that, but also pictures taken from the Flight
22 Manual, testimony from Mr. Domingo as to the serial
23 numbers of the aircraft to which those particular
24 markings are applicable. The aircraft, under Mr.
25 Domingo's testimony, and it is not contradicted, falls

1 within that range of numbers, so it was required to
2 have this yellow marking.

3 There was testimony that there might be a
4 type of turbine third wheel in there that possibly
5 would not require this type of caution line. However,
6 there is no testimony to support the conclusion that
7 there was any type of modification to this particular
8 aircraft which would bring it into an exception. There
9 is nothing there to support that.

10 There is a letter from Mr. Knight, who is
11 apparently the current owner. It is attested to by, I
12 believe his son. However, there is no dates on there,
13 and it, in my view, is not sufficient in and of itself,
14 although it is receivable as hearsay under the Board's
15 Rules, it is subject to the weight to be attached. The
16 testimony of Mr. Domingo with respect to this, where he
17 was present in court and subject to cross-examination,
18 is, in my view, entitled to greater weight and I make
19 that determination.

20 I, therefore, conclude that upon the reliable
21 and probative evidence by preponderance, that it is
22 established that the dual tachometer did not have the
23 yellow caution range as required by the aircraft Flight
24 Manual, and, therefore allegation 3(c) is established.

25 3(e) deals with discrepancies alleged with

1 the weight and balance of the helicopter. It deals
2 with a cabin heater, a lead acid battery, and also a
3 fuel extender, all these items being installed on this
4 helicopter. The evidence in front of me does show that
5 there were these items, in fact, on this helicopter at
6 the time in question. They were appropriately on the
7 helicopter under STCs and, as Mr. Randels testified to,
8 and established under Exhibit R-4, there are Form 337s
9 showing this work, and, further, that revisions were
10 made to the weight and balance pages.

11 There is no documentary evidence in front of
12 me as to what the actual weight and balance pages
13 computations in this aircraft, the paper work,
14 contained. If these things were placed in the aircraft
15 by mechanics, which apparently they were, in accordance
16 with STCs and 337s -- and the 337s, as Mr. Randels
17 testified to, do reflect that revisions were made to
18 the weight and balance, that is sufficient. The pilot
19 is not required to do anything more than to check the
20 weight and balance paper work. If it shows that there
21 has been a change in the aircraft, and the numbers are
22 in there, that is what he goes by. He doesn't go out
23 there and re-weigh components.

24 Further, if the mechanic actually says that
25 he made a revision and didn't make the revision, unless

1 there is some showing that the particular pilot knew
2 that something had been done, and there is no revision,
3 I don't think you can charge him. In this case, there
4 is a lack of evidence, in my view, to show that the
5 items, the cabin heater, the lead acid battery, and the
6 fuel extender, which on the 337s were properly
7 installed, with revisions made in the weight and
8 balance, that the weight and balance pages did not
9 reflect that. That is the burden of proof on the
10 Government. The Government has failed to do that with
11 respect to those items. Therefore, I do not find that
12 those charges are established.

13 However, with respect to the fuel extender,
14 it is required under the Supplemental Type Certificate,
15 which was received as C-5, that when this extender is on
16 the aircraft, as it is in this case, that two placards
17 are required to be present. There has to be a placard
18 with the wording as set forth in Section 1 of the
19 Operating Limitations after the standard operations
20 pilot minimum weight placard is removed, and then there
21 also to be a placard giving weight limitations
22 installed on the inside of the baggage compartment.

23 Mr. Domingo testified that, on his
24 inspection, these placards were not present. There is
25 no contradictory testimony. I find, therefore, that on

1 the preponderance of the evidence, it is established
2 that the aircraft did not have these placards
3 installed.

4 In summary, therefore, on the preponderance
5 of the evidence in front of me, I find that the
6 discrepancies which I have found were present at the
7 time of the flight of February 4, 1996. Those
8 discrepancies rendered the aircraft unairworthy, which
9 is different than flyable. It was unairworthy as a
10 matter of law. Therefore, I find and conclude that the
11 Respondent did, at the time in question, when operating
12 as pilot-in-command, did operate in violation of
13 Section 91.7(a), and that he operated a civil aircraft
14 when it was not in an airworthy condition.

15 I further find, as a residual offense, that
16 the Respondent operated the aircraft in a careless
17 manner so as to endanger the life or property of
18 others. The Board has held that operation of an
19 aircraft that is not in an airworthy condition is at
20 least potentially hazardous. However, in accordance
21 with the Board's position, as enunciated in
22 Administrator versus Silvermill, I view this as a
23 residual offense and it does not, in my view, add in
24 any way to the appropriate sanction.

25 I have taken into account the sanction table

1 offered by the Complainant. I have also considered the
2 factual allegations which have been established and
3 those which were either stricken or allegations which
4 were not established. And taking those into account,
5 and also the prior violation history, and to act as a
6 deterrent to the Respondent and to others similarly
7 situated, and to assuage the public interest in air
8 safety and air commerce and transportation, that it
9 would be sufficient to modify the period of suspension
10 to that of 50 days. And with that modification, I will
11 affirm the Order of Suspension as modified by this
12 Decision.

13 It is therefore ordered that:

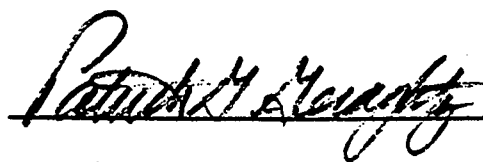
14 The Order of Suspension become and the same
15 hereby is modified in accordance with the Decision
16 herein.

17 2. The period of suspension is hereby
18 modified to provide for a suspension of 50 days rather
19 than 90 days.

20 The Order of Suspension, the Complaint, as
21 modified, both as to findings and as to the period of
22 suspension become and the same hereby is affirmed.

23 4. The Respondent's Airline Transport
24 Pilot's Certificate, be and the same hereby is, suspended
25 for a period of 50 days.

1 Entered this 9th day of July, 1997, at
2 Spokane, Washington.
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5 
6 Patrick J. Geraghty *entered*
7 Patrick J. Geraghty, Judge 7/22/97
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10 Either party to the proceeding may appeal
11 therefrom by filing with the Board within 50 days from
12 this date, a brief in support of his appeal. The
13 appealing party must, however, notice his appeal within
14 10 days from this date. Documents must be filed with
15 the Docket Section, Office of Administrative Law
16 Judges, National Transportation Safety Board,
17 Washington, D.C. 20594, with copies served upon the
18 opposing party. The parties are referred to the
19 Board's Rules of Practice for further information
20 concerning appeals.

21 The parties are specifically cautioned that
22 they need to request extensions before the time has
23 expired, or to file their documents in a timely fashion
24 or the Board will probably dismiss an appeal if the
25 parties don't perfect them timely.

1 If the Board, on its own motion, doesn't
2 elect to review the decision, or if no appeal is taken,
3 the decision shall become final as provided by Board
4 rule. However, the timely filing of a notice of appeal
5 and supporting brief shall stay the Decision and Order
6 during the pendency of the full Board review.
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1 JUDGE GERAGHTY: Anything else?

2 MR. LAYLIN: I have nothing, Your Honor.

3 MR. CONLIN: Nothing, Your Honor. Thank you.

4 JUDGE GERAGHTY: Thank you. Closed.

5 (Whereupon, at 3:23 p.m., the hearing was

6 concluded.)

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NTSB Order No. EA-4681

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of June, 1998

Respondent.

Docket SE-14729

Respondent, appearing pro se, appeals the oral initial decision of Administrative Law Judge William A. Pope, II, rendered at the conclusion of an evidentiary hearing held on September 9, 1997.¹ By that decision, the law judge affirmed the Administrator's finding that respondent

¹ An excerpt from the hearing transcript containing the law judge's initial decision is attached.

violated sections 39.3, 91.7(a) and 91.13(a) of the Federal Aviation Regulations ("FAR"), 14 CFR Parts 39 and 91, and affirmed the Administrator's suspension of all airman certificates held by respondent, including his airline transport pilot ("ATP") certificate, for 120 days.² We deny the appeal.

The initial decision includes a detailed recitation of the evidence, so only a brief summary of the relevant facts is necessary here. On February 27, 1995, Federal Aviation Administration Principal Maintenance Inspector Jon Strickland conducted a ramp inspection of N2559Z, a twin-

² FAR §§ 39.3, 91.7 and 91.13 provide, in relevant part, as follows:

§ 39.3 General.

No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive.

§ 91.7 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

* * * * *

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

engine Piper PA23-250 Aztec owned by respondent. In the course of that inspection, Inspector Strickland noticed in the cockpit a placard indicating that the aircraft's cabin heater was inoperative.³ He informed respondent during his ramp inspection that the cockpit placard was insufficient, and that in order to operate the aircraft legally under Part 91 it was necessary to also deactivate the heater. See 91 C.F.R. § 213. He also told respondent about several methods by which the heater could be satisfactorily deactivated.

Inspector Strickland later reviewed AD 82-07-03 in detail and discovered that it requires the heater to be inspected every 100 hours of time in service, or every 24 months, whichever occurs first. The aircraft's logbook, however, indicated that the heater was last inspected pursuant to the AD on September 23, 1992.⁴ After Inspector Strickland learned that respondent nonetheless operated N2559Z on March 5th and 6th, 1995, when the heater had not been deactivated or inspected as required -- and contrary to his discussion with respondent during the February 27, 1995, ramp inspection -- he initiated this enforcement action.

³ Respondent and his mechanic were aware of maximum allowable intervals between inspections of the aircraft's Janitrol cabin heater, mandated by Airworthiness Directive ("AD") 82-07-03. The aircraft's logbook contains a May 18, 1994, entry indicating "cabin heater inoperative due to decay test due." Exhibit ("Ex.") A-1.

⁴ The heater was ultimately inspected in compliance with AD 82-07-03 on March 6, 1995, subsequent to the flights that form the basis of the Administrator's complaint.

Respondent knew or should have known, after his discussion with Inspector Strickland, that the terms of the AD were material so long as the heater was not deactivated, and the AD clearly states that the required inspection is due every 100 hours or 24 months. Respondent also knew or should have known that during the relevant flights the heater was not in compliance with AD 82-07-03 because more than 24 months had elapsed since its last inspection. As Inspector Strickland testified, non-adherence to the AD rendered the aircraft unairworthy. See, e.g., Administrator v. Bailey and Avila, NTSB Order No. EA-4294 at 11 (1994) ("an aircraft is deemed 'airworthy' only when it conforms to its type certificate [i]f and as that certificate has been modified by . . . Airworthiness Directives"). Moreover, respondent's operation of an unairworthy aircraft supports a residual finding of carelessness or recklessness. See Administrator v. Rogers, NTSB Order No. EA-4428 at 5-6 (1996).⁵

Turning to respondent's appeal brief, respondent alleges various points of error by the law judge and, in the alternative, that his sanction is too severe. His arguments, however, are unavailing. First, he argues that

⁵ The record thus supports the finding that respondent violated sections 91.7(a) and 91.13(a). It also appears that the law judge concluded that respondent operated the cabin heater -- a violation of section 39.3 -- and respondent did not offer contrary testimony.

because the Administrator did not provide him with a "list of citations to all cases" upon which she intended to rely at least fifteen days prior to the hearing, as instructed by the law judge's prehearing order, he was "ambushed."⁶ We do not think the Administrator's non-adherence to the prehearing order was prejudicial, however, for the Administrator gave respondent timely notice of the essence of the relied-upon case law, and the law judge gave respondent the opportunity to use as much time as he felt he needed to review at the hearing copies of those cases ultimately supplied to him.⁷ In short, we find no abuse of

⁶ Respondent also argues that the Administrator violated the prehearing order by not submitting the material required for expert witnesses. The Administrator's sole witness, Mr. Strickland, however, never provided expert testimony, at least not any that was relevant to the resolution of this case. Evidence about the harm the AD was designed to prevent, whether respondent actually used the aircraft's heater during the flights at issue, or the substance of a new, replacement AD reissued after those flights -- even if, which we doubt, it be characterized as expert testimony -- simply does not pertain to a proper resolution of whether or not respondent violated FAR sections 91.7(a) or 91.13(a), or whether a 120-day suspension is an appropriate sanction.

⁷ The Administrator's timely prehearing submission indicated, in part, that she:

. . . intends to rely on the line of cases indicating noncompliance with ADs is a serious breach of an operator's obligation to comply with [FARs], renders aircraft unairworthy, can suggest a noncompliant attitude, and supports a suspension. . . .

In addition, during settlement discussions that took place well before the hearing and through counsel that then represented respondent, respondent was made aware of the
(continued . . .)

discretion in the law judge's procedural ruling.

Respondent also complains that the Administrator did not supply him with copies of Exhibits A-1 and A-2 at least fifteen days prior to the hearing, in contravention of the law judge's prehearing order. The Administrator's timely prehearing submission, however, notified respondent that "some or all of the Items of Proof included in the EIR in this case, including copies of the AD in issue[,] might be offered into evidence. Moreover, the exhibits are merely photocopies of the respondent's aircraft logbook and records, and respondent therefore cannot claim that he was surprised or prejudiced by the introduction of those exhibits. Cf. Administrator v. Heisner and Diaz, 6 NTSB 733, 740-741 (1988). We also find no abuse of discretion in the law judge's decision to allow the Administrator to introduce the exhibits.

Turning to sanction, we find no reason to modify the 120-day suspension imposed by the Administrator.⁸ The Administrator introduced the relevant portions of her

(continued . . .)

Administrator's sanction guidance table and, in light of the Administrator's counsel's claimed representations during those discussions, the 120-day suspension ultimately sought by the Administrator should not have surprised respondent.

⁸ In our view, respondent's demonstrated non-compliance attitude is the most serious aspect of this case. See Administrator v. Erickson, NTSB Order No. EA-3735 at 6 (1992).

sanction guidance table into evidence and we note that, for each violation, it recommends a suspension of between 30 and 180 days for both "operation of an unairworthy aircraft" and "failure to comply with Airworthiness Directives." Ex. A-3. Thus, despite respondent's protestations to the contrary, a 120-day suspension is not inconsistent with precedent, and we therefore find no basis for concluding that the Administrator's choice of sanction was arbitrary or capricious. See, e.g., Administrator v. Reina, NTSB Order No. EA-4508 (1996), request for modification denied, NTSB Order No. EA-4552 (1997).⁹

⁹ Respondent attached to his appeal brief a letter from a certified public accountant indicating the financial impact a 120-day suspension would have on respondent. Aside from the fact that this is new evidence, properly objected to by the Administrator, such considerations are not a proper basis for modifying an otherwise legitimate sanction. See, e.g., Administrator v. Mohamed, 6 NTSB 696, 700 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 120-day suspension of respondent's airman certificates, including his ATP certificate, shall begin 30 days after the service date of this opinion and order.¹⁰

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹⁰ For the purposes of this order, respondent must physically surrender his airman certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C.

- - - - -X
In the Matter of:
BARRY L. VALENTINE,
ACTING ADMINISTRATOR,
Federal Aviation Administration

Complainant,

v

Docket No.: SE-14729

JOHANNES VAN OVOST

Respondent.

- - - - -X

National Transportation
Safety Board
301 North Park Avenue
Room N-220
Sanford, Florida

Tuesday, September 9, 1997

The above-entitled matter came on for hearing pursuant to
notice at 1:00 p.m.

BEFORE: William A. Pope, II
Administrative Judge

APPEARANCES:

Counsel for
Federal Aviation Administration:

Vincent Bennett, Esq.
5950 Hazeltine National Drive, Suite 510
Orlando, Florida 32822.

APPEARANCES: (cont.)

PRO SE:

JOHANNES VAN OVOST
5405 East Echo Pines Circle
Fort Pierce, Florida 34951

1 that's what I allow.

2 MR. VAN OVOST: I understand.

3 JUDGE POPE: Administrator goes first,
4 respondent goes second, administrator gets a brief
5 rebuttal to what the respondent said.

6 MR. VAN OVOST: Okay, sir.

7 JUDGE POPE: And that's basically what
8 happened here.

9 All right. If you'll come back in an hour,
10 and we'll stand in recess for that length of time.

11 MR. VAN OVOST: Thank you very much.

12 (Whereupon, a recess was had. After which,
13 the proceedings resumed as follows:)

14 JUDGE POPE: The following is my oral initial
15 decision in the case of the administrator, Federal
16 Aviation Administration, complainant, versus Johannes Van
17 Ovost, Docket Number SE-14729.

18 This is a proceeding under the provisions of
19 of Section 609 of the Federal Aviation Act codified at 49
20 USC 44709, and the provisions of the Rules of Practice ⁱⁿ and
21 Air Safety Proceedings of the National Transportation
22 Safety Board.

23 Johannes Van Ovost, the respondent, has
24 appealed the administrator's order of suspension dated
25 November 21, 1996, as amended on December 20, 1996, and as

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1 again amended today, which, pursuant to Section 821.31 (a)
2 of the Board's rules serves as the complaint, in which the
3 administrator ordered the suspension of ^{a'}airman pilot
4 certificates held by him, including his airline transport
5 pilot certificate Number 001896286 for a period of one
6 hundred and twenty days because of alleged violations of
7 Sections 91.13 (a), 91.7 (a), and 39.3 of the Federal
8 Aviation Regulations.

9 Unless requested to do so, I will not read
10 the complaint in this case.

11 Is there any request that I do that?

12 MR. BENNETT: None from the administrator.

13 JUDGE POPE: Nor will I read the text of the
14 statutes, that is to say the regulations which allegedly
15 have been violated by the respondent.

16 Is there any request that I do that?

17 MR. BENNETT: None for the administrator.

18 JUDGE POPE: All right.

19 In his answer, the respondent admitted the
20 allegations in paragraphs one, two and four of the
21 complaint. He admitted paragraph five but said that he
22 was transporting the aircraft to Vero Beach for the
23 inspection which FAA Inspector Strickland notified him had
24 to be done.

25 As to the allegations in paragraph six,

(u)

1 respondent stated that he believed that placarding the
2 heater as inoperative was sufficient compliance with AD
3 note . . . AD 82-7-3 when the aircraft was only operated
4 by two people and it was only operated in an area where
5 the heater would never be used.

6 The only witness to testify in this proceeding
7 was principal maintenance Inspector Jon Scott Strickland
8 of the Federal Aviation Administration's Flight Standards
9 District Office in Orlando, Florida, who at the time
10 relevant to this case was the principal maintenance
11 inspector with responsibility for overseeing Part 135
12 operations conducted by respondent under his Part 135
13 certificate.

14 His duty was to ensure continued compliance by
15 Part 135 operators with Federal Aviation Regulations under
16 which they operate.

17 On February 27, 1995, Inspector Strickland
18 conducted a ramp inspection on N2559Z, a twin engine Piper
19 250 aircraft which was on respondent's Part 135
20 certificate. The inspection was conducted in a hangar at
21 respondent's facility at Fort Pierce, Florida where he
22 operates as a fixed base operator at the airport.

23 During the inspection, he noticed a
24 handwritten placard posted on the instrument panel near
25 the heater switch saying the heater was inoperative.

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1 From respondent's mechanic, Inspector
2 Strickland learned that the heater was operative but there
3 was an hourly inspection requirement for the heater in an
4 airworthiness directive, and they did not want to exceed
5 the time limit by operating it.

6 Respondent said he was not using the heater in
7 Florida and had not operated the aircraft in Part 135
8 operations for the past several months.

9 Inspector Strickland said the aircraft did not
10 have an MEL, minimum equipment list, and he advised the
11 respondent that he could not operate the aircraft in part
12 135 operations unless the heater was removed, or in Part
13 191 operations unless it was deactivated and placarded.

14 In the aircraft log book, Inspector Strickland
15 found a form showing that on 9-23-92, September 23, 1992,
16 the heater had been inspected and a pressure decay test
17 had been done on it.

18 An entry for May 28, 1994 states, quote, cabin
19 heater inoperative due to decay test due, end quote, and
20 is signed by mechanic McCullom.

21 The next and last entry in the aircraft
22 maintenance log book is dated May 6, 1995, which is after
23 the ramp inspection, and is from the Sun Aviation,
24 Incorporated, repair station in Fort -- Strike that, in
25 Vero Beach, Florida, and states that the AD, the

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1 airworthiness directive, had been complied with, a heater
2 decay test had been performed, and the heater checked
3 okay.

4 Subsequent to the ramp inspection, Inspector
5 Strickland examined the AD involved, AD 82-7-3, and
6 determined that the inspection requirement existed for
7 every twenty-four month interval of operation, or one
8 hundred hours of use, whichever came first.

9 In his answer to the complaint, respondent
10 admitted that he operated the aircraft under Part 135 on a
11 flight arriving at the Palm Beach International Airport,
12 Palm Beach, Florida on March 5, 1995, and that he operated
13 the aircraft on a flight to Vero Beach, Florida on March
14 6th, 1995. The purpose of the latter flight, it appears,
15 was to have the Sun Aviation, Incorporated, located at Vero
16 Beach, perform the inspection necessary for compliance with
17 the AD.

18 Inspector Strickland testified that the
19 twenty-four months since the last AD required inspection
20 and testing of the heater had expired on September 23,
21 1994, and that all operations of the aircraft after that
22 date were while the aircraft was not in compliance with
23 the AD.

24 He stated the pressure decay test required by
25 the AD is for the purpose of detecting leaks in the heater

1 combustion chamber where aircraft fuel is burned for heat
2 in order to prevent leaks, fire, and/or explosion.

3 He said that respondent showed him the log
4 entry for March 6, 1995 confirming that the AD had been
5 complied with.

6 He said the heater is not a required part, but
7 if it is installed and there is no MEL, it must be
8 operative for the Part 135 operations.

9 He said that it could be removed and the
10 aircraft could still be used in Part 135 operations, but
11 just deactivating it was not enough.

12 For Part 91 operations, however, it would be
13 sufficient to deactivate it and make it incapable of
14 operation and to placard it.

15 He said that could have been done by
16 respondent's mechanic in Fort Pierce before respondent
17 flew the aircraft to Vero Beach on March 6, 1995 to have
18 it repaired at Sun Aviation.

19 He said that respondent could have applied for
20 a ferry permit to take the aircraft to Vero Beach but did
21 not and none was issued.

22 Inspector Strickland said that he collected
23 the weather for Palm Beach airport on March 5, 1995 and
24 determined that at an altitude of five to six thousand
25 feet, the air temperature would have been from fifty-eight

02

1 to forty-eight degrees, which is cold enough for heater
2 operation.

3 Having had the opportunity to observe the
4 testimony of Inspector Strickland and to judge his
5 credibility as a witness, I find him to be a completely
6 truthful and credible witness.

7 Based on his testimony, the documentary
8 evidence introduced in the hearing, as well as the
9 admissions in respondent's answer, I find that at the time
10 of the two flights alleged in the complaint, March 5 and
11 6, 1995, the Janitrol, J-a-n-i-t-r-o-l heater in N2559Z
12 had not been inspected within the twenty-four month period
13 specified in AD 82-7-3 since the last inspection, and
14 therefore, that AD had not been complied with.

15 There is ample -- There is ample authority
16 that airworthiness directives have the force and effect of
17 law.

18 An aircraft which fails to comply with an AD,
19 is not airworthy because it does not conform to its type
20 certificate as modified by the AD. It is not a question
21 of whether the aircraft is safe to operate, or whether or
22 not the pilot might or might not have occasion to use the
23 part or appliance which does not comply with the AD.

24 The ultimate responsibility to ^{make sure} ~~answer~~
25 ~~certificate~~ if an aircraft is airworthy is the pilot's.

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1 To prove a violation, the administrator must
2 prove that the airman knew or should have known that the
3 aircraft did not conform to its type certificate.

4 Here the respondent was specifically told by
5 an FAA inspector who was also his principal maintenance
6 inspector that the aircraft could not be operated under
7 Part 135 unless the heater was removed or under Part 91
8 unless it was deactivated or disabled, and placarded.

9 Clearly respondent knew that the aircraft was
10 unairworthy since none of this had been done ^{Therefore it} and could not
11 be operated.

12 Here the respondent, after that warning,
13 within a time of about six weeks, operated the aircraft
14 twice without either having the heater removed for a Part
15 135 operation, or deactivated for a Part 91 operation.

16 These operations can only be described as
17 willful operations of an unairworthy aircraft.

18 I reject respondent's contentions that his
19 operation of N2559Z was in compliance with Inspector
20 Strickland's directions.

21 I find just the opposite, that it was
22 specifically contrary to his advice. There is no excuse
23 for the March 5, 1995 Part 135 operation into Palm Beach.

24 Respondent could easily have used his mechanic
25 to deactivate the heater or remove it for the flight to

1 Vero Beach the next day.

2 Under all the circumstances, respondent could
3 not have had a reasonable belief that his operation of the
4 aircraft was consistent with Federal Aviation Regulations,
5 and, in fact, he knew or should have known that the
6 aircraft was unairworthy.

7 The evidence of record is sufficient to
8 establish by a preponderance that respondent violated FAA
9 Sections 91.7 (a) by operating an aircraft that was not in
10 an airworthy condition, and FAR Section 39.3 by operating
11 a product to which an AD applied contrary to the
12 requirements of the AD.

13 It is well established that operation of an
14 aircraft in an unairworthy condition can support a finding
15 of a violation of Section 91.13 (a), careless or reckless
16 operation.

17 Here the three violations, however, should be
18 considered as one for the purposes of sanction.

19 Remaining is the question of sanction.

20 The administrator has amended the complaint
21 reducing the sanction he seeks to a one hundred and twenty
22 day suspension. The range of sanctions provided for in
23 the administrator's table and approved by Board precedent
24 is suspension for thirty to one hundred and eighty days of
25 an airman's certificates.


1 Here the administrator seeks a sanction of
2 suspension of all of respondent's airman certificates for
3 one hundred and twenty days, which falls slightly more
4 than the middle of the range of sanctions.

5 As the respondent has provided no explanation
6 which mitigates his operation of the aircraft while it was
7 unairworthy, and he knew or should have known it was
8 unairworthy, I find the sanction requested by the
9 administrator to be appropriate to the offenses.

10 Upon consideration of all the substantial,
11 reliable and probative evidence of record, I find that the
12 administrator has proven, by a preponderance of the
13 evidence, that respondent violated Sections 91.13 (a),
14 91.7 (a), and 39.3 as alleged in the complaint.

15 Accordingly, it is hereby ordered the
16 administrative, one, the administrator's order is
17 affirmed; two, all airman pilot certificates held by
18 respondent, including his airline transport pilot
19 certificate Number 001896286, shall be and are suspended
20 for a period of one hundred and twenty days; three, this
21 order shall take effect, eleven days after this date.

22 I will now advise the parties of the appeals
23 procedures that are applicable to this case, and after I
24 do that, I will hand both sides a written advice on
25 appeals procedures.



1 Any party to this proceeding may appeal this
2 Oral Initial Decision Order by filing with the Office of
3 Judges, National Transportation Safety Board, a written
4 notice of appeal within ten days after the date of this
5 oral initial decision. Such initial appeal must be
6 perfected within fifty days after the date of this oral
7 initial decision by filing with the General Counsel,
8 National Transportation Safety Board a brief in support of
9 of such appeal. Appeals may be dismissed by the Board on
10 its own motion or on motion of a party in cases where a
11 party fails to perfect its appeal by the timely filing of
12 the brief. Your attention is directed to Sections 821.43,
13 821.47, and 821.48 of the Board's Rules of Practice in Air
14 Safety Proceedings for further information regarding
15 appeals. An original and four copies of the initial
16 notice of appeals must be filed with the NTBS Office of
17 Judges, Room 5531, 490 L'Enfant Plaza East, that's capital
18 L, apostrophe, capital E-n-f-a-n-t Plaza East, Southwest,
19 S.W. Washington, D.C. 20594, telephone 202-314-6150. An
20 original and four copies of the brief in support of the
21 appeal must be filed directly with the NTSB Office of the
22 General Counsel, Room 6401490 L-Enfant Plaza East,
23 Southwest, Washington, D.C. 20594. In addition, an
24 original and one copy of any motions filed after the
25 initial notice of appeal are to be filed directly with the

1 office of the General Counsel as shown above. Please note
2 that the Board will not accept late appeals or briefs.

3 And Mr. Van Ovost, for your benefit, I urge
4 you to take notice of that. You must file a timely notice
5 of appeal if you want to appeal this case for the Board to
6 accept it. If it's late, they probably will not.

7 At this time, I'll have one copy of the
8 written advice . . . of the written appeals procedures
9 advice marked as ALJ Exhibit One and give it to the
10 reporter for inclusion into the record.

11 And gentlemen, if you'll each take a copy, and
12 if you could give that to Mr. Van Ovost, please.

13 Is there anything further to come before me in
14 connection with this case?

15 MR. BENNETT: None for the administrator.

16 JUDGE POPE: Mr. Van Ovost?

17 MR. VAN OVOST: (Shakes head.)

18 JUDGE POPE: All right. Then the hearing is
19 closed. Thank you, gentlemen.

20 (Whereupon, at 5:30 p.m. the hearing in the
21 above-entitled matter recessed.)

22
23 Edited 9/24/92
24 *Villiam J. Pope*
25 Judge

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SERVED: July 28, 1998

NTSB Order No. EA-4683

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 28th day of July, 1998

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

DAVID WINDWALKER,

Respondent.

Docket SE-14102

ORDER DENYING STAY


Respondent has requested a stay of NTSB orders EA-4638 and 4671, served February 20, 1998, and June 17, 1998, pending disposition of a petition for review of those orders to be filed in the U.S. Court of Appeals.¹ The Administrator opposes the request. A stay is not warranted in this case.

The Board's policy on stays in the case of suspensions of 180 days or more is to review the seriousness of the violations case-by-case. Here, the Board specifically found that "respondent acted with willful disregard of legitimate safety concerns." EA-4638 at 6. Respondent had reason to believe that the balloon was not safe, but chose to operate the balloon, with passengers, regardless. Respondent offers no reason why we should authorize his continued piloting in the circumstances.

¹ In EA-4638, the Board affirmed a 180-day suspension of respondent's airman certificate for operating an unairworthy hot air balloon. In EA-4671, the Board denied respondent's petition for reconsideration.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for stay is denied.


Daniel D. Campbell
General Counsel

INITIAL DECISIONS AND ORDERS

FOR THE MONTH OF

JULY 1998

SERVED: July 9, 1998

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY,
Administrator,
Federal Aviation Administration,

Complainant,

v.

ALBERT F. WILSON,

Respondent.

Docket SE-9131RM

INITIAL DECISION ON REMAND

SERVICE: Gerald Cunningham, Esq.
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Albert F. Wilson
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Eddie L. Thomas, Esq.
Federal Aviation
Administration
Southern Region
Post Office Box 20636
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(ALL BY CERTIFIED MAIL)

Before: William E. Fowler, Jr., Chief Judge:

This case arises from a March 7, 1988 order, by which the Administrator of the Federal Aviation Administration ("FAA") suspended respondent's private pilot certificate for 90 days, for alleged violations of §§ 91.9 and 91.90(a)(1)(i) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.), stemming from an incursion into the Atlanta, Georgia terminal

control area ("TCA") occurring on June 6, 1986.¹ In an oral initial decision issued at the conclusion of an evidentiary hearing held on July 6, 1988, Administrative Law Judge John E. Faulk reversed that order in part, finding that respondent had violated FAR § 91.90(a)(1)(i), but not § 91.9. In that decision, Judge Faulk also determined that no sanction should be imposed for the violation found, on the basis that respondent's entry into the TCA was a result of a transponder malfunction, of which he was unaware at the time the incident occurred. Both the Administrator and respondent subsequently appealed that decision to the full Board, which, in a decision served on April 4, 1990 (NTSB Order EA-3089), held that:

As both parties recognize . . . , the malfunction of the transponder cannot be treated as a mitigating factor [to reduce sanction] -- [rather,] it is either exculpating or it is not. Respondent's defense, simply put, is that his altimeter was telling him that he was at 2400 feet, [(an altitude below the floor of the TCA)], but that the transponder (or, more specifically, the altitude encoding feature) was telling ATC radar that the plane was as much as 3100 feet higher (or at 5500 feet). If this defense is accepted, then there was no incursion

¹FAR §§ 91.9 and 91.90(a)(1)(i) have since been amended and recodified. (FAR § 91.9, dealing with careless or reckless operation of aircraft, was recodified without substantive change at § 91.13(a), effective August 18, 1990. FAR § 91.90(a)(1)(i) was part of § 91.90, which governed the operation of aircraft in TCAs and has been amended on several occasions since June 1986. Effective September 16, 1993, TCAs were redesignated as Class B airspace, and the current regulation affecting the operation of aircraft in such airspace is found at § 91.131.) The pertinent FAR provisions in effect at the time of the alleged violations read as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.90 Terminal control areas.

(a) Group I terminal control areas--

(1) Operating rules. No person may operate an aircraft within a Group I terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(i) No person may operate an aircraft within a Group I terminal control area unless he has received an appropriate authorization from ATC [(air traffic control)] prior to the operation of that aircraft in that area."

and the entire order of suspension must fall. On the other hand, if there was [in fact] a TCA incursion at 5500 feet, then the transponder altitude encoder was accurate.

Since the determination of whether the malfunctioning encoder was exculpatory may rest in part on a credibility assessment of witness testimony, the Board is remanding the case to the law judge.²

Subsequently, Judge Faulk retired from federal service, and, for reasons unknown, the record in this proceeding was lost. As a result, no further action was taken on the Board's remand. A telephone inquiry into the status of this case by counsel for the Administrator a number of months ago led to the discovery that the original record had become lost, and it thus became necessary for the record to be reconstructed. After this was accomplished, counsel for both parties were afforded an opportunity to furnish written submissions prior to the disposition of this case on remand. No such submissions were, however, received, and the undersigned, as Chief Judge, will now enter a decision herein based upon the reconstructed record as currently constituted. Upon due consideration of the record, and for the reasons set forth below, it appears that the defense raised by respondent is a valid one, that it is exculpatory in nature, and that the Administrator's order should, therefore, be reversed in toto.

The Administrator's suspension order, which was reissued as the complaint in this proceeding, contains the following factual allegations:

1. At all times material herein you were and are the holder of Private Pilot Certificate No. 266505699.
2. On or about June 6, 1986, you operated civil aircraft N6656L, a Beech 36, on a flight in the vicinity of Atlanta, Georgia.
3. During the course of the above-described flight you operated N6656L within the Atlanta, Georgia Terminal Control Area (TCA) without receiving an appropriate authorization from Air Traffic Control (ATC).
4. You[r] operation of N6656L as described above created a potential collision hazard with other aircraft arriving and departing from Hartsfield International Airport.

²NTSB Order EA-3089 at 5.

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It is clear from his earlier initial decision that Judge Faulk found, after hearing the evidence, that the transponder in respondent's aircraft was malfunctioning at the time the incident in question occurred.³ Moreover, the record shows that the aircraft's transponder subsequently provided false altitude readouts, and that, upon testing later in June 1987, the transponder's altitude encoder was found to be performing erratically.⁴

Respondent, who was at the time an experienced instrument-rated pilot,⁵ testified that he regularly flew the route used on the subject flight,⁶ and would, when flying that route, follow the practice of proceeding at an altitude of 2,400 feet at the point in question so as to fly below the lower limits of the Atlanta TCA.⁷ He further testified that the weather conditions were clear on the day of the subject flight,⁸ that he conducted that flight under visual flight rules,⁹ and that he saw "normal traffic which is . . . much higher than I was,"¹⁰ and observed no other traffic at his altitude.¹¹ Respondent also testified that his altimeter read 2,400 feet at that point in the flight.¹² Given this, together with the transponder's subsequent repair history¹³ and the complete absence of any evidence of altimeter malfunction, the undersigned is compelled to conclude that the transponder's altitude encoder was indeed malfunctioning during the flight in question, and that it gave ATC a false reading of 5,500 feet at a time when respondent's aircraft was actually at 2,400 feet. As a result, it must be found that respondent

³In the initial decision, Judge Faulk observed: "I . . . find mitigating circumstances in the fact that apparently the transponder was not working properly and without [r]espondent's knowledge." Tr. 204

⁴Tr. 128-31, 138-40, 146; Ex. R-4.

⁵Tr. 119-20.

⁶Id. 121.

⁷Id. 122.

⁸Id. 123-24.

⁹Id. 123.

¹⁰Id. 126.

¹¹Id.

¹²Id. at 143, 147.

¹³See Exs. R-4, R-5.

operated the aircraft below the floor of the TCA. Thus, there was no TCA incursion and no violation of FAR § 91.90(a)(1)(i). It therefore follows that the Administrator's order of suspension must be reversed in its entirety.

In view of the above, the following facts are found:

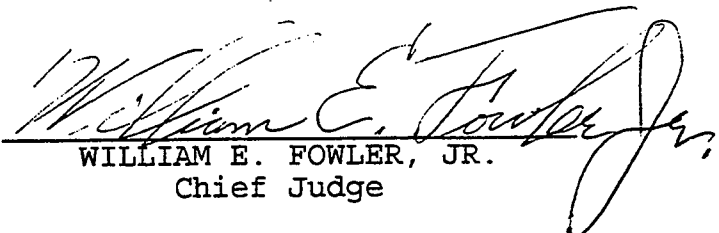
1. At all relevant times, respondent was the holder of Private Pilot Certificate number 266505699;
2. On or about June 6, 1986, respondent operated civil aircraft N6656L, a Beech 36, on a flight in the vicinity of Atlanta, Georgia;
3. Respondent did not, during the course of that flight, operate N6656L within the Atlanta, Georgia, TCA without receiving an appropriate authorization from ATC; and
4. Respondent's operation of N6656L on that flight did not create a potential collision hazard with other aircraft arriving and departing from Hartsfield International Airport.

By virtue of the aforesaid facts, it is further found that respondent did not, as is alleged by the Administrator, violate either § 91.9 or § 91.90(a)(1)(i) of the FARs. Accordingly, the suspension of respondent's airman certificate, ordered by the Administrator on March 7, 1988, is wholly unwarranted.

THEREFORE, IT IS ORDERED THAT:

- 1) Respondent's appeal in this proceeding is hereby GRANTED; and
- 2) The Administrator's March 7, 1988 order suspending respondent's private pilot certificate for 90 days is hereby REVERSED IN ITS ENTIRETY.

Entered this 9th day of July, 1998, at Washington, D.C.


WILLIAM E. FOWLER, JR.
Chief Judge

APPEAL

Any party to this proceeding may appeal this written initial decision or order by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision or order. An original and 3 copies of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of the other party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and 3 copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on the other party.

An original and 3 copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

2104

Served: July 10, 1998

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

Application of

CARLOS ERNESTO GARTNER,

Docket No. 259-EAJA-SE-14023

for fees and expenses under the
Equal Access to Justice Act.

ORDER DENYING AWARD OF FEES AND EXPENSES UNDER
THE EQUAL ACCESS TO JUSTICE ACT

Service: David McDonald, Esq.
1393 SW First Street
Miami, FL 33135
(By Fax and Certified Mail)

Carlos Ernesto Gartner
c/o Sofia Powell-Cosio, Esq.
1390 Brickell Avenue, #200
Miami, FL 33131
(By Certified Mail)

Michael A. Moulis, Esq.
Federal Aviation Administration
Southern Region at Orlando
5950 Hazeltine National Drive
Suite 510
Orlando, FL 32822
(By Fax and Certified Mail)

William A. Pope, II, Administrative Law Judge: On December 9, 1996, the Applicant, Carlos Ernesto Gartner, filed a "Motion for Award of Reasonable Attorney's Fees, Costs and Expenses Pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504." That motion was dismissed without prejudice, as premature, on December 18, 1996. Thereafter, on March 10, 1998, the Applicant filed an "Amended Motion for Award of Reasonable Attorney's Fees, Costs and Expenses Pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504,"¹ seeking an award against the Administrator of the Federal Aviation Administration (FAA) in the total amount of \$15,396.97². The Administrator subsequently filed an "Answer to Application for Attorney Fees" was filed on April 9, 1998. A reply to the Administrator's answer was then filed by the Applicant on April 24, 1998. The Application is now ready for decision.

The Application and supporting documents filed by the Applicant establish that he meets the eligibility requirements set out in the Equal Access to Justice Act and the Board's Rules implementing that Act, and the Application is both timely and procedurally correct.

I

¹ This is a proceeding filed under the Equal Access to Justice Act, 5 U.S.C. § 504, and the Board's Rules Implementing the Equal Access to Justice Act of 1980, 49 C.F.R. Part 826.

² The Applicant claimed \$17,567.50 for attorney fees, based on a charge of \$175.00 per hour, plus expenses, but reduced the claim to \$14,235.15, based on 107.5 hours times \$132.42 per hour, which he calculated to be the maximum allowable hourly rate. (See 49 C.F.R. § 821.6(b)) The total award claimed was \$15,396.97.

105

In the Administrator's complaint in the underlying proceeding, dated March 31, 1995, the Applicant was charged with violation of two rules of the air of Annex Two (rules of the air) of the Convention on International Civil Aviation. The violations charged were of Chapter 3.1.1, by operating an aircraft in a negligent or careless manner so as to endanger the life or property of another; and, Chapter 4.5(b), by operating an aircraft less than 500 feet above the ground or water.

On September 7, 1995, following an evidentiary hearing, this Administrative Law Judge issued an Oral Initial Decision, finding that the Applicant had violated Chapter 3.1.1 of the Convention, but not Chapter 4.5(b). Accordingly, the latter charge was dismissed, and the undersigned reduced the sanction imposed against the Applicant to a \$1,000 civil penalty. On appeal, the full Board, on November 8, 1996, reinstated the Chapter 4.5(b) violation alleged by the Administrator, but determined that no sanction should be imposed on the Applicant for the two violations found. NTSB Order EA-4495. Thereafter, on March 5, 1998, the Board denied a petition by the Administrator for reconsideration of its November 8, 1996 decision. NTSB Order EA-4623.

As noted by the Board, the facts which gave rise to the Administrator's certificate action against the Applicant are not in dispute. The Applicant was a member of a volunteer group based in South Florida known as the Brothers to the Rescue, which conducted flights over the Straits of Florida (between Florida and Cuba), looking for refugees from Cuba or other Caribbean nations on rafts or small boats. While on such a flight on June 9, 1994, the Applicant, who served as pilot-in-command, spotted a raft with six-to-ten persons on board in the water 25-to-30 miles north of Cuba. The Applicant then descended to an altitude of 25-to-30 feet over the raft, and dropped a radio in a waterproof package for the occupants of the boat to use to communicate with the aircraft. His intent was to fly as close as possible to the raft before dropping the radio, so that none of the occupants of the raft would drown attempting to swim out from the raft to recover the radio. The Applicant apparently did not see a mast sticking up from the raft, and hit the mast with the right wing of his aircraft. The resulting damage to the wing made the aircraft unairworthy, but the Applicant was able to land safely on one of the Florida Keys.

There was testimony that supported the conclusion that the Administrator had earlier sent representatives to a meeting of the Brothers to the Rescue to discuss safety issues, including the dangers of low flight above water. The Administrator's representatives, although clearly aware of the low flight practices of the Brothers to the Rescue, made no mention of a rule against low flight. The Applicant himself testified that he was unaware of an altitude restriction, but was aware that the U.S. Coast Guard routinely operated low flights to rescue Cuban refugees.³

Based on the evidence, the undersigned found that the FAA's Miami Flight Standards District Office was well aware of the low flight practices of the Brothers to the Rescue, but took no steps to put a stop to them, or to even inform the organization that an exemption was needed. Thus, it was found that the Administrator, by the inaction of her representatives, effectively granted a tacit exemption to the Brothers to the Rescue to operate low flights to determine if occupants of rafts and small boats were in distress. However, the undersigned sustained the careless operation charge because the Applicant had operated his

³ The Administrator granted permission to the U.S. Coast Guard to operate low altitude rescue flights.

aircraft at a very low altitude directly over the raft, without taking the prudent precaution of making sure that nothing was projecting above the raft – such as the mast the Applicant hit, which he testified he did not see.

On appeal by the Administrator, the Board reinstated her finding of a Chapter 4.5(b) violation,⁴ stating that “[w]e believe that, rather than dismissal, the record supports findings that the violation occurred but [that the imposition of] sanction in this case, whether suspension or civil penalty, is not appropriate.” Accordingly, the Board imposed no penalty for the two violations established. In finding that the Applicant had violated Chapter 4.5(b), the Board held that there can be no tacit low flight exemption, because a written petition for an exemption from Chapter 4.5(b) is required, and may not be granted by FAA inspectors in the field. However, the Board opined that, since the FAA failed to advise the Brothers to the Rescue of the unlawfulness of their standard operating procedures, the Brothers to the Rescue could reasonably believe that their operations, while inherently risky, generally complied with regulatory requirements. For that reason, the Board concluded that “[w]e think it reasonable, in the circumstances, to consider this prosecution improvidently brought, and mitigate its effect by waiving sanction.”

In its subsequent Order Denying Petition for Reconsideration, the Board stated:

We imposed no duty to warn. Instead we recognized an obligation on the part of the FAA, especially important given its law enforcement role, not to mislead – either by acts of omission or commission – those subject to its authority. We did so simply as a matter of fairness. We did not intend, and do not, in the FAA's words, [to] “hobble” its methods of communicating with airmen regarding safety concerns. The record established that FAA employees were familiar with the high seas operations of the Brothers to the Rescue organization, indeed had met with members of the group and had discussed rescue and assistance operations. Despite knowing how those operations were conducted, e.g., that they included flights below 500 feet, FAA employees failed to advise respondent and others, at a meeting called by the FAA with the group to discuss its operations, that such flights violated Chapter 4.5(b). It is nothing more than the most basic fairness to require as much; otherwise, one could liken the FAA's action to entrapment of a sort. Indeed, a discussion of the dangers of an operation, without reference to its unlawfulness, would suggest to the reasonable person that the action was not unlawful. What we are imposing here is not a duty to warn but a duty to deal fairly and thoroughly when providing information that can be misinterpreted. (Citations omitted)

II

The Equal Access to Justice Act, 5 U.S.C. § 504, *et seq.*, requires the Government to pay to the prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. § 504(a)(1). To be a prevailing party, the Applicant need not prevail on every issue in order to receive an award of fees and expenses. The Applicant need show only that he has won “a significant and discrete substantive portion of the proceeding.” *Application of Swafford and Coleman*, NTSB Order EA-4426 (1996). Once that burden has been met, the Administrator must show that she was substantially justified in her position in order to avoid an award. *Application of Wendler*, 4 NTSB 718, 720 (1983). For the Administrator's position to be substantially justified, it must be reasonable in both fact and law, *i.e.*, the facts

⁴ The Applicant did not appeal the undersigned's finding that he had violated Chapter 3.1.1.

alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. *Application of U.S. Jet, Inc.*, NTSB Order EA-3817 at 2 (1993); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *U.S. v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir. 1984). Reasonableness in fact and law should be judged as a whole, including whether "there was sufficient reliable evidence initially to prosecute the matter" at each succeeding step of the proceeding. *Application of U.S. Jet, Inc.*, *supra*, at 2; *Application of Philips*, 7 NTSB 167, 168 (1990). But the Board has also made it clear that the substantial justification test is less demanding than the Administrator's burden of proof, and it is not whether the government wins or loses that determines whether its position was substantially justified. *Application of U.S. Jet, Inc.*, *supra* at 3; *Federal Election Commission v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986). In *Application of Scott*, NTSB Order No. EA-4274 (1994), the Board said that "[u]nder EAJA, the Administrator has a duty to discontinue his investigation or prosecution at any time he knows or should know that his case is not reasonable in fact or law, or be liable for EAJA fees for any further expenses applicant incurs. The Administrator was required to analyze, as more information became available to him, whether continued investigation and prosecution was reasonable." NTSB Order EA-4274 at 5 (emphasis original).

III

Clearly, the Applicant in this case did not prevail as a matter of law on either the alleged Chapter 3.1.1. or Chapter 4.5(b) violations. The violation of Chapter 3.1.1, for careless operation of an aircraft, found by the undersigned, was not appealed and thus became final. The violation of Chapter 4.5(b), for low flight, although dismissed by the undersigned, was affirmed by the full Board on appeal on the basis that the Brothers to the Rescue had neither applied for nor received an exemption from the FAA from the low flight restrictions of Chapter 4.5(b) before the flight at issue took place, and therefore that flight -- which was flown below 500 feet -- violated Chapter 4.5(b) as a matter of law. Because, however, the Brothers to the Rescue's methods of operation, including low flights, were known to the FAA's representatives before the flight in question occurred and the FAA's representatives did not inform the members of the group that such actions were illegal without an FAA exemption, the Board found that there was an element of unfairness in bringing the case which could be adequately dealt with by imposing no sanction against the Applicant for the violations found.

The question here thus becomes whether the Applicant partially prevailed for EAJA purposes because no sanction was imposed, even though both of the regulatory violations alleged by the Administrator were ultimately sustained. This case is similar to *Swafford and Coleman*, *supra*, and distinguishable from *Application of Gilfoil*, NTSB Order EA-3982 (1993), because the underlying proceeding was not simply litigation understood by the parties to be over sanction with respect to the low flight issue, but whether the actions of the Administrator's representatives exonerated the Applicant on that charge. In this case, as in *Swafford and Coleman*, the Board found that the Applicant had violated Federal Aviation Regulations in that he violated the low flight prohibition contained in Chapter 4.5(b) of the Convention on International Civil Aviation, as charged in the complaint⁵ -- but that the imposition of a sanction was,

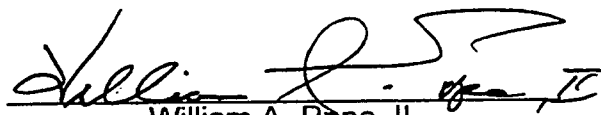
⁵ The finding at the hearing that the Applicant had also operated his aircraft at least carelessly, in violation of Chapter 3.1.1, was not appealed (see n. 4, *supra*) and was not discussed by the Board

nevertheless, not warranted on equitable grounds because of the FAA's failure to warn the Brothers to the Rescue, and the Applicant as a member of that group, that a low flight over international waters required an exemption from the FAA. The Board noted that a suspension was not needed as a deterrent, because this defense would not be available to future violators, and therefore neither the public interest nor safety requires the Applicant's certificate to be suspended. Thus, while, as in *Swofford and Coleman*, the Applicant here received a tangible benefit because of the outcome of the case, he failed to achieve the benefit he sought – i.e., exoneration of the charges. Therefore, I find that the Applicant was not a prevailing party in this case within the meaning of the EAJA.

In any event, as in *Swofford and Coleman*, regardless of whether the Applicant is deemed to have prevailed, I also find that the Administrator was substantially justified in pursuing this case and the sanction sought in the suspension order. The Administrator had ample evidence that the Applicant operated his aircraft at least carelessly by flying so low over the raft that the wing of the aircraft hit a mast projecting from the raft. Obviously, one of the most important duties of a pilot is to make sure that he does not run into anything with his airplane, particularly when he is engaged in something as inherently dangerous as a low flight over a vessel in the water. That was my finding at the hearing, and the Applicant did not appeal that determination. It was also undisputed that the Applicant descended below the minimum altitude restriction imposed by Chapter 4.5(b) without an exemption from the FAA. In view of this, the Administrator was substantially justified in pursuing that alleged violation. The Board found, as a matter of law, that the exemption required for low flight over international waters must be in writing; and the Brothers to the Rescue had neither applied for nor received such a written exemption. Thus, the Administrator's case was neither legally weak nor tenuous. The waiver of sanction by the Board was for the unusual and essentially unforeseeable reason that, under the peculiar circumstances of the underlying matter, the imposition of any sanction against the Applicant was neither equitable nor required as a deterrent to future violations. Since the Administrator could not reasonably have anticipated such a disposition of the underlying certificate action, she was substantially justified in bringing that action against the Applicant.

THEREFORE, the Applicant's Application for an award of attorney fees and expenses under the Equal Access to Justice Act is hereby DENIED.

Entered this 10th day of July, 1998, at Washington, D.C.


William A. Pope, II
Judge

in its decision on the single issue that was appealed, the violation of Chapter 4.5(b). Even if were to be assumed for sake of argument that the Applicant was not in violation of Chapter 4.5(b) because of the low flight, that did not give him license to operate his aircraft carelessly.

APPEAL

Any party to this proceeding may appeal this written initial decision and order by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

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Office of Administrative Law Judges
Room 5531
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Telephone: (202) 314-6150 or (800) 854-8758

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The Board directs your attention to Rule 38 of its Rules Implementing the Equal Access to Justice Act (codified at 49 C.F.R. section 826.38) and Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

Issued
GWA

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR *
Federal Aviation Administration, *
Complainant, *
v. * Docket Number
RICHARD B. ZERKEL, * SE-15154
Respondent. *

Courtroom 36, Third Floor
Boney Court House
303 K Street
Anchorage, Alaska 99501

Thursday,
July 16, 1998

ORIGINAL

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

GLENN H. BROWN, ESQ.
Federal Aviation Administration
Alaskan Region
222 W. 7th, #4
Anchorage, Alaska 99513-7587

On behalf of the Respondent:

TIMOTHY E. MILLER, ESQ.
Miller and Associates
5005 SW Meadows Road
Suite 405
Lake Oswego, Oregon 97035

EXECUTIVE COURT REPORTERS, INC.
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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR *
Federal Aviation Administration, *
Complainant, *
v. * Docket Number
RICHARD B. ZERKEL, * SE-15154
Respondent. *

ORAL INITIAL DECISION AND ORDER

BY JUDGE WILLIAM R. MULLINS

This has been a proceeding before the National Transportation Safety Board, held under the provisions of Section 44709 of the Federal Aviation Act of 1958, as amended, on the appeal of Richard B. Zerkel, who I'll refer to as the Respondent, from an Order of Suspension that seeks to suspend his airman certificate for a period of 180 days. The Order of Suspension serves as complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through the Alaskan Region.

The matter has been heard before me, William R. Mullins. I'm an administrative law judge, and as is provided by the Board's rules, I am issuing a decision today.

EXECUTIVE COURT REPORTERS, INC.
(301) 565-0064

1 The matter came on for hearing here in
2 Anchorage this 16th day of July of 1998. The
3 Administrator was present at all times and represented
4 by counsel, Mr. Glenn Brown, Esquire, of the Regional
5 Counsel's Office, and the Respondent was present at all
6 times and was represented by Mr. Tim Miller, Esquire,
7 of Lake Oswego, Oregon.

8 The parties were afforded a full opportunity
9 to offer evidence, to call, examine and cross examine
10 witnesses. In addition, the parties were afforded an
11 opportunity to make argument in support of their
12 respective positions.

13 Discussion

14 The Order of Suspension in this matter
15 alleges two regulatory violations, FAR 91.13(a) and
16 91.155(a), in that the aircraft was -- did not maintain
17 cloud separation as required under that regulation.

18 The general facts are pretty much undisputed
19 about the type of aircraft, the date, the location,
20 pilot in command, where the aircraft was coming from
21 and going to, and that is the aircraft of the
22 Respondent, and the issue as set out in argument of
23 counsel initially was a simple issue of whether or not
24 the Administrator's case would establish by a
25 preponderance of the evidence that the aircraft was in

1 violation of FAR 155(a).

2 The Administrator called two witnesses. The
3 first was the first officer of the Pen Air flight, a
4 Metro Liner, that was going in to Unalakleet, and I'll
5 probably mispronounce that, but I'm going to call it
6 Unalakleet for the purposes of this discussion.

7 But in any event, he was the first officer of
8 the aircraft going into Unalakleet. They were at the
9 -- flying the -- they were on an instrument flight
10 plan, and they were cleared for the VOR approach to 1-
11 4, and they were at the VOR going outbound, and they
12 were at an altitude of about 3,000 feet, maybe 3,100
13 feet, but in any event, they were about a hundred to a
14 150 feet above this cloud level that Mr. Cullinane said
15 was an overcast layer.

16 He said he had seen holes prior to getting to
17 the VOR, but on the outbound approach, they didn't see
18 any holes in the overcast layer, and I thought it was
19 interesting here, no one mentioned it, I'll just say
20 this in passing because it -- it struck me in my little
21 bit of flying experience, if you're flying over clouds
22 with -- with ocean below, the likelihood of spotting
23 holes is less likely than if you're flying over terrain
24 because it stands out more.

25 But in any event, the testimony was clear,

1 and the evidence -- from the evidence that from the VOR
2 outbound just about, they were continuously over water
3 during this incident. But in any event, as they were
4 about to make their procedure turn, they -- their TCAS
5 alerted them that there was an aircraft in the area.

6 Now, any time you see TCAS alert, that makes
7 everybody's ears go up. Certainly it made mine go up,
8 but as it turned out, according to Mr. Cullinane, that
9 this TCAS was just -- all it did at this point in time
10 was identify that there was an aircraft in the area,
11 and I think he -- he described this as a non-intruder
12 target, and that the TCAS never changed from this non-
13 intruder target designation for the TCAS at any time
14 throughout these proceedings, and, so, that testimony
15 alone, which was unrebutted by the first -- I mean by
16 the captain, renders the allegation that because of
17 whatever they were doing that day, the other aircraft
18 had to do a missed approach.

19 The other aircraft, the testimony was, and
20 I'm satisfied here, and I'll just tell you now, that
21 the other aircraft -- the evidence has not established
22 that the other aircraft had to do a missed approach.
23 The aircraft established that the other aircraft
24 elected to do a missed approach, and I think it's
25 commendable of Mr. Buerk to make that decision, but the

1 TCAS indication, as testified to by Mr. Cullinane, did
2 not dictate that they had to do that.

3 Mr. Cullinane also testified that he saw the
4 aircraft at 2 to 2:30 position, and that he said it was
5 at least two miles, and at one point, he thought the
6 TCAS was saying it was five miles, but he couldn't
7 remember whether it was two, three or five, but it
8 might have been as much as five, and Mr. Buerk's
9 testimony on that regard -- and Mr. Cullinane was very
10 specific about the TCAS because he said that was his
11 job as the non-flying officer that day to pay attention
12 to those instruments, i.e. the TCAS and the radio, and
13 he watched the TCAS.

14 Mr. Buerk testified that he thought the
15 aircraft was a mile away, and he said that was based on
16 his estimate of the distance as he observed the
17 aircraft out there.

18 In any event, they did do a missed approach.
19 The other aircraft -- Mr. Cullinane said they saw the
20 other aircraft go down through the clouds. He
21 testified, as did Mr. Buerk, that there could have been
22 a hole out there. They didn't think there was, but
23 there could have been one. Later, when they -- after
24 they did their missed approach, they got cleared again
25 immediately, and they landed, and Mr. Cullinane said he

1 saw the Hagland aircraft or the Respondent's aircraft
2 sitting there, that he did not go talk to the
3 Respondent, and that pretty much was his testimony.

4 Mr. Buerk was called. Mr. Buerk was the
5 captain of the Pen Air flight, the Metro Liner, and he
6 testified about their procedure turn, their going out-
7 bound from the VOR, their procedure turn. When they
8 were coming back, he said after they came off their
9 procedure turn and got on course back inbound, they
10 spotted the aircraft, and again his testimony was that
11 the aircraft was about one mile at the 1:00 position
12 and was moving and at one point was at the 12:30
13 position, he said, moving to the left, and then they
14 saw it go into the clouds, and his testimony was if
15 they remained on the course that they were on, that
16 they would have come within 300 feet of where the
17 aircraft descended, and he said at no time did they see
18 a hole as described by Mr. Zerkel in his testimony.

19 After they got on the ground, Mr. Buerk went
20 to -- and talked with Mr. Zerkel. He said that Mr.
21 Zerkel said he was always below the clouds, and when he
22 said no, we saw you above the clouds, then he said Mr.
23 Zerkel said, well, I came down through a hole, but he
24 did say that Mr. Zerkel never admitted any wrong-doing
25 to him out there on the ramp.

1 Mr. -- apparently Mr. Buerk then reported
2 this to the FAA. Mr. Buerk is now going through
3 training or was going through training at the time of
4 his deposition, which was back the end of May, that was
5 presented here today to become a pilot for Reno Air
6 down in San Jose.

7 Those were the two witnesses that testified
8 on the Administrator's case in chief. Respondent then
9 called Mr. Sparks, who was a passenger in the aircraft
10 and was an employee of Hagland Air, and he's the
11 Director of Maintenance. He was very consistent as I
12 think a non-pilot passenger would be. He remembered
13 going through a hole. He didn't watch any of the
14 instruments. There was -- I assume he knows what some
15 of the instruments are, but perhaps he never had seen
16 them in operation, you know, in flight, but all he knew
17 was they went down through a hole. They were never in
18 the clouds, and the rest of his testimony was pretty
19 vague.

20 The second witness was Mr. Zerkel. Mr.
21 Zerkel testified that -- that they were about -- how
22 the flight, which was originally going up to Kotzebue,
23 sort of got diverted down to Unalakleet, and how they
24 came in from over the ocean where it was clear, and it
25 was progressing from clear to scattered to broken to

1 overcast, and he saw the hole, and he descended through
2 the hole. He never saw the other aircraft. He heard
3 him calling for a Navajo, and he didn't even respond
4 because he knew the people on the ground knew that he
5 was coming, and he assumed that the call for the Navajo
6 was not him.

7 But he said the hole was large enough, and
8 they never penetrated any clouds. He descended VFR
9 through the hole, landed at Unalakleet.

10 Mr. Westall then testified about this line of
11 sight vision and sponsored a couple exhibits,
12 Respondent's Exhibit 2 and 3, which would show that at
13 a mile away, what the sight line would be of the pilots
14 in the Pen Air flight or the Administrator's witnesses,
15 and how at that level they couldn't even see if there
16 was a hole there or not.

17 Then in -- and then there was a lot of
18 discussion about the angle and whether Mr. Buerk's
19 angle of the 12:30, how far off that would have been,
20 and if they had proceeded that one mile from where the
21 aircraft disappeared, the Respondent's aircraft, or
22 whether they could have seen the hole.

23 Then Mr. Elgee was called on rebuttal, and --
24 and in all fairness to Mr. Elgee, I think he testified
25 absolutely correctly, but I think he was given

1 information that wasn't even part of the record, and it
2 was a good expert opinion, but it had no basis in the
3 evidence, and I -- this 30-degree -- there was no
4 evidence that there was wind that would require a 30-
5 degree crab angle, and, so, I just am not going to pay
6 any attention to what Mr. Elgee talked about on the
7 rebuttal.

8 Let me -- there were -- the Administrator had
9 three exhibits. The first was a tape of Mr. Buerk's
10 testimony, video tape deposition, and A-2 is a
11 transcript of that video tape deposition, and A-3 was
12 an approach plate to Unalakleet that shows the VOR
13 approach that they were flying, and it specifically
14 shows that the water is pretty much all out to the west
15 there where they were traveling.

16 Respondent had three exhibits. R-1 was a --
17 sort of a streamlined edition of the transcript of Mr.
18 Buerk's testimony. R-2 and 3 I've identified as the
19 diagrams sponsored by Mr. Westall.

20 In this case, the Administrator has the
21 burden of proving the case by a preponderance of the
22 evidence, and obviously as counsel know, the
23 preponderance of the evidence means that evidence which
24 seems more probably true than not true.

25 Here, credibility of witnesses is to a

1 certain extent an issue, and in this case, to a certain
2 extent, it's not because I -- I found myself in this
3 case comparing the credibility of Mr. Cullinane and Mr.
4 Buerk rather than -- and both who are Administrator's
5 witnesses versus comparing their testimony to Mr.
6 Zerkel.

7 I don't think there's anything inconsistent
8 between Mr. Zerkel's testimony and what the
9 Administrator's witnesses testified to, except that key
10 issue, whether or not there was a hole out there. They
11 said they saw him go down through the clouds; he said
12 he didn't, there was a hole, and I think it's important
13 here that I point out for the record and this
14 discussion that this is not an issue about an airplane
15 going through a hole without enough clearance. That --
16 that's not even an issue for me today, and I can't -- I
17 couldn't make that determination from this evidence,
18 that there was a hole but it wasn't large enough.

19 The evidence is either I believe the
20 Administrator's case that there wasn't one or I believe
21 the Respondent's case that there was.

22 In this regard, I point out again that both
23 of the Administrator's witnesses in the case in chief
24 testified that there could have been a hole out there,
25 and they didn't see it. They both testified to that in

1 their testimony.

2 Mr. Zerkel was very clear about his. He said
3 there was a hole. I went through it. I didn't violate
4 any cloud restrictions.

5 I think the TCAS evidence is pretty critical
6 in this case, and that is -- and again I'm comparing
7 the testimony of Mr. Cullinane and Mr. Buerk. Mr.
8 Cullinane said this was my job. I was looking at it.
9 It said this, and it meant that it was at least two
10 miles, and it might have been up to five miles, and the
11 aircraft was at the 2 or 2:30 position, and he's on the
12 right side of the cockpit, and I was impressed by that
13 because if the airplane's at the 2 or 2:30 position for
14 him, it probably would be at the 2:30 or 3 position for
15 the pilot. So, there was a real inconsistency there.

16 The pilot or captain had the aircraft way out
17 front, the co-pilot had it way around to the side.
18 That was inconsistent. Mr. Buerk said it was one mile,
19 Mr. Cullinane said it was at least two miles, maybe
20 five, according to the TCAS, and he was using an
21 instrument measurement device as opposed to Mr. Buerk's
22 estimating it was a mile out there.

23 I think the 30-degree angle that was talked
24 about from the 1:00 position and the distance -- Mr.
25 Buerk just seemed satisfied that if he continued his

1 course, within 20 or 30 seconds, he would have been
2 right where the plane disappeared, and -- and I think
3 the testimony and the -- and Mr. Westall pointed out
4 that these were all variables when you're out there
5 under those conditions, but he testified that Mr.
6 Buerk's testimony was not consistent with the numbers
7 because at one mile on their heading, and if the other
8 aircraft disappeared in the clouds at the 12:30
9 position, that the distance would have been as much as
10 1,500-2,000 feet, I believe was the testimony.

11 So, -- and that's if it was at the 12:30
12 position, and again the other Administrator's witness
13 said that the aircraft was around at the 2:30 position
14 and two to five miles away.

15 Mr. Buerk on testimony about the TCAS, and
16 I -- and I appreciate the complexity of the instruments
17 used in the different aircraft, but he was real vague
18 about this. He was two months out of the cockpit of
19 the Metro Liner and the use of that particular TCAS,
20 and he was pretty vague about it and was very honest
21 that he was being vague about it because he couldn't
22 recall exactly what it was, and he talked about the new
23 training that he was going through, and I understood
24 where he was coming from on that.

25 Mr. Cullinane is still in the Metro Liner

1 cockpit as far as I could determine and is still
2 working with it every day.

3 Let me summarize for you. I -- this is an
4 interesting summary. I think Mr. Buerk was mistaken
5 about the conclusions he arrived at, but at the same
6 time, probably of the three pilots who testified today,
7 I think I'd rather fly with Mr. Buerk. He -- he knew
8 his business, and he felt like there was a violation
9 out there that day, and he took the action necessary to
10 bring that presumed violation to the attention of the
11 Administrator.

12 His first officer testified to something
13 completely different, and it was sort of refreshing
14 that he didn't come in here with obviously canned
15 testimony that they had rehearsed together or that the
16 Administrator had had them rehearse together, but there
17 was just such a consistency there, and with each other,
18 that that really casts into doubt the Administrator's
19 evidence, and even if I had believed the evidence, if I
20 had believed both of them, and they were consistent
21 with their testimony, then I would have had to weigh it
22 against Mr. Zerkel's testimony, and I'm not sure even
23 at that point I could have arrived at a conclusion that
24 there was a violation of 91.155.

25 But certainly with this inconsistency between

1 the Administrator's witnesses and the case in chief, I
2 just cannot find that there was a regulatory violation
3 as alleged, and specifically the Order of Suspension in
4 this case, the Respondent has alleged that he held the
5 pilot certificate alleged with airline transport pilot
6 privileges, that he served as the captain or pilot in
7 command of the aircraft in question on the date in
8 question. He admitted at the time of the flight there
9 were two passengers on board. He admitted that the
10 flight was conducted under VFR, visual flight rules.

11 He denied that he passed through a layer of
12 clouds on his approach to Unalakleet. He denied that
13 because of this action, an ATC clearance -- an aircraft
14 with an ATC clearance had to execute a missed approach,
15 and he denied that the operation of the aircraft was
16 careless or reckless.

17 Specifically, there was -- I did not find by
18 a preponderance of this evidence that the aircraft
19 passed through a layer of clouds, and as I described
20 earlier, I did not find that an aircraft with an ATC
21 clearance had to execute a missed approach. I think
22 that was something that Captain Buerk did, and -- and
23 in that regard, one other comment that I want to make
24 is that it was clear from the TCAS evidence that was
25 presented that the Respondent's aircraft was

1 transmitting a transponder Mode C code that ATC would
2 have picked up, and I think that ATC, if there had been
3 a requirement for a missed approach, ATC would so
4 advise. That wasn't in the evidence, but it certainly
5 was in the evidence that there was -- that the Mode C
6 was operating. There wasn't any evidence that the
7 Administrator's -- the air traffic control folks
8 weren't picking it up, and they certainly never at
9 least communicated to this IFR aircraft that there was
10 a problem out there in the air space which they had an
11 obligation to do.


12 But in any event, based on these discussions,
13 I find that there has not been shown the regulatory
14 violations as alleged.

15 Order

16 It is therefore ordered that safety in air
17 commerce and safety in air transportation does not
18 require an affirmation of the Administrator's Order of
19 Suspension.

20 Specifically, I've found that there was not
21 shown by a preponderance of the evidence either a
22 regulatory violation of FAR 91.13(a) or FAR 91.155(a),
23 and even though the Administrator may have had
24 substantial reason to go forward with this case based
25 on the testimony of Mr. Buerk, that testimony did not

1 prevail by a preponderance of the evidence, and that
2 will be the order.

3 
4 William R. Mullins
5 Administrative Law Judge

6 The Administrator has the right to appeal
7 this Order, and you may do so by filing your Notice of
8 Appeal within 10 days of this date.

9 Mr. Zerkel, if the Administrator files an
10 appeal, then you'll need to respond to their brief
11 within 50 days of this date.

12 I have the rights to appeal. Would you like
13 a copy of those, Mr. Miller, --

14 MR. MILLER: Yes, I have them.

15 JUDGE MULLINS: -- just in case they appeal?
16 You're familiar with them?

17 MR. MILLER: Yes, I am.

18 JUDGE MULLINS: I assume, Mr. Brown, you're
19 quite conversant with them, but you're welcome to have
20 a copy of this nice print-out.

21 MR. BROWN: Thank you, Your Honor. No. I
22 have them.

23 JUDGE MULLINS: Does the Administrator have
24 any question about the Order?

25 MR. BROWN: No.

26 JUDGE MULLINS: All right. Questions?

1 MR. MILLER: No question, Your Honor.

2 JUDGE MULLINS: All right. Thank you,
3 gentlemen. The hearing's terminated.

4 (Pause)

5 JUDGE MULLINS: We're back on the record for
6 just a second. Just for the record, it needs to be
7 reflected that Respondent's Exhibits 2 and 3 will be
8 transmitted to the Office of Administrative Law Judges
9 in Washington by the Respondent.

10 MR. MILLER: That's correct, Your Honor..

11 JUDGE MULLINS: All right. Thank you, and
12 we're off the record.

13 (Whereupon, the hearing was concluded.)

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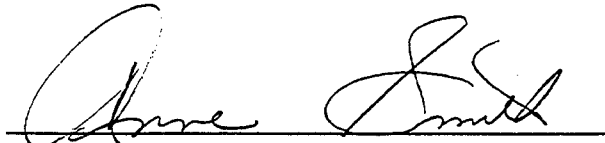
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CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and order which was signed and edited on August 17, 1998, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 17th day of August, 1998.

A handwritten signature in cursive script, appearing to read "Anne Smith", written over a horizontal line.

**ANNE SMITH
Paralegal Spec/Hearings Asst.
Circuit IV, WILLIAM R. MULLINS
Administrative Law Judge
Arlington, Texas**

**RICHARD B. ZERKEL
SE-15154**

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: *
*
ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *
*
Complainant, *
* Docket Nos.
v. * SE-14807RM
* SE-14832RM
LARRY KIRSCH AND PAUL E. RODERICK, *
*
Respondents. *

Monday,
July 20, 1998

Courtroom 36, 3rd Floor
Boney Court House
303 K Street
Anchorage, AK

The above-entitled matter came on for
hearing, pursuant to notice at 9:00 a.m.

BEFORE: WILLIAM R. MULLINS,
Administrative Law Judge

On behalf of the Complainant:

HOWARD MARTIN, Esquire
FAA/Alaskan Region
222 West 7th Ave., #14
Anchorage, AK 99513

On behalf of the Respondent Roderick:

BARTON M. TIERNAN, Esquire
1407 W. 31st Avenue, Ste. 104
Anchorage, AK 99503

APPEARANCES (continued)

On behalf of the Respondent Kirsch:

LARRY KIRSCH, Pro Se
1847 Preuss Road
Los Angeles, CA 90035

1 ORAL INITIAL DECISION AND ORDER:

2 JUDGE MULLINS: This has been a proceeding
3 before the National Transportation Safety Board held
4 under the provisions of Section 44709 of the Federal
5 Aviation Act as amended. And the matter is on for
6 hearing on the appeal of two individuals, Mr. Larry
7 Kirsch and Mr. Paul E. Roderick. And I will refer to
8 them as Respondents, collectively, throughout this
9 decision. From orders of suspension that seek to
10 suspend their airmen certificates for periods of 60
11 days each.

12 The orders of suspension serve as complaints
13 in our proceedings and were filed on behalf of the
14 Administrator of the Federal Aviation Administration
15 through Regional Counsel of the Alaskan Region. The
16 matter has been heard before me, William R. Mullins. I
17 am an Administrative Law Judge for the National
18 Transportation Safety Board. And as is provided by the
19 Board's rules, I will announce the decision this
20 morning.

21 The matter came on for hearing, pursuant to
22 notice that was given to the parties and the
23 Administrator was represented throughout these
24 proceedings by Mr. Howard Martin, Esquire of the
25 Alaskan Region, Regional Counsel's Office. Respondent

1 Roderick was present at all times and represented by
2 Mr. Barton M. Tiernan, Esquire of here, in Anchorage.
3 And Mr. Kirsch was present throughout the proceedings
4 and represented himself.

5 The parties were afforded a full opportunity
6 to offer evidence, to call and examine and cross
7 examine witnesses. In addition, the parties were given
8 an opportunity to make argument in support of their
9 respective positions.

10 DISCUSSION

11 The case has been presented very quickly and
12 it is very straightforward and the facts really are
13 undisputed. And the facts are basically that Mr.
14 Roderick was on the date in question, on August 4 of
15 1996, in the Wood River area of Alaska. And I am not
16 sure where that is, but in any event, it is a remote
17 area of Alaska, was operating a Cessna 185 along a
18 route of flight and in the opposite direction of the
19 same route of flight, Mr. Kirsch was operating a Hughes
20 helicopter. And for reasons that no one knows, the
21 aircraft had a mid air collision. The helicopter
22 descended fairly abruptly downward, and crashed,
23 although it was developing enough, although it had lost
24 its tail rotor, that the pilot and apparently did a
25 good job of getting the aircraft on the ground and the

1 people walked away from it. Mr. Roderick's aircraft
2 sustained some damage to the tail area, he did lose a
3 tail wheel off the of Cessna 185, but, he was able to
4 continue on.

5 The conduct of the pilots, you know, after
6 the flight, after both of them were commendable. They
7 did what they had to do. There was talk that Mr.
8 Roderick notified the FAA. But, in any event, this
9 accident happened. As a result of that accident
10 happening, the Administrator has alleged regulatory
11 violation of FAR 91.13(a), which is the regulation
12 concerning careless and/or reckless flight, so as to
13 create property damage, hazard. The second regulatory
14 violation alleged is FAR 91.113(b), which is the
15 failure to see and avoid other aircraft. And then
16 third regulatory violation is FAR 91.113(e), and that
17 while approaching another aircraft head on you failed
18 to alter your course to the right.

19 I, up-front, I find that there was not
20 established the regulatory violation of FAR 91.113(e).
21 In that there was never an opportunity to move to the
22 right. When the aircrafts spotted each other, if they
23 had moved to the right, neither would have been here
24 today. And it seems to me that if you have the
25 113(b), if they fail to see, you couldn't have the

1 regulation that says that they saw and failed moved to
2 the right. I think they are inconsistent and I can't
3 image a case where you would have both of those
4 regulatory violations. So I am dismissing the FAR
5 91.113(e) violation as to both of the Orders of
6 Suspension.

7 We had testimony from both of the pilots
8 today and from Mr. Cordele of the FAA. But, neither
9 pilot and even Counsel said in closing statement,
10 neither pilot saw the other until just a split second
11 before the accident. And if you are in VFR conditions,
12 I can't help but believe that absence some really clear
13 explanation of why they didn't see the other one, that
14 would establish the regulatory violation as alleged.
15 Because of that, there would obviously be a residual
16 violation here because there not only was the potential
17 of endangering life or property, but there was property
18 damage and perhaps even some injury to those folks
19 aboard the helicopter.

20 So, I am finding under these circumstances as
21 to both of these individuals, that there was
22 established regulatory violation of FAR 91.13(a) and
23 91.113(b). Which brings me then to sanction. The
24 Administrator has provided Exhibit 6, which is a
25 sanction guidance table. And the only one that I can

1 find in here would be Paragraph 43, which states
2 operating solely as to cause a collision hazard. And
3 they, obviously we wouldn't have had, folks wouldn't be
4 here today, if they had been out there deliberately
5 trying to run over each other, which I often think that
6 is what that particular regulation and/or sanction
7 guidance provision applies as to, where somebody is
8 directly or is in an area where they at least should be
9 aware that there is other people and don't take some
10 action to avoid creating a collision hazard.

11 I don't get too much out of the sanction
12 guidance offered by the Administrator. I don't think
13 that 60 days is appropriate in this case. First of
14 all, I didn't find regulatory violation of 91.113(e).
15 And this circumstance, so we have pilots who were
16 operating in a remote area of the world, albeit in a
17 pass, certainly they should have seen each other, but I
18 am not concerned so much about a large time of
19 suspension. And from my own piloting experience and I
20 know all pilots that I talk to, have had this same
21 experience as to be flying along with ~~flight~~ flight,
22 following VFR, and air traffic control says you have got
23 an aircraft one o'clock coming towards you, at altitude
24 unknown or maybe 500 feet below you, or at least they
25 identify an aircraft out there where they direct your


1 attention, and you proceed and you look and look and
2 look, and after awhile, they say that aircraft is no
3 longer a factor and you never do see it. And that is
4 when you are specifically looking for the airplane.
5 And so, in that respect this is almost a strict
6 liability type of a statute ~~for~~ a regulation.

7 But, under these circumstances, particularly,
8 the conduct of the pilots after the incident, Mr.
9 Kirsch's conduct in getting the aircraft on the ground,
10 some very good flying skills. Mr. Roderick continuing
11 on, notifying the people, getting a check of his
12 aircraft before he landed, notifying the FAA and also
13 in consideration of the fact that they have no
14 violation history, either of them and long time pilots.
15 I feel that appropriate sanction here would be a 15 day
16 suspension for each of the pilots.

17 ORDER:

18 It is, Therefore, ordered that safety and air
19 commerce and safety in air transportation does not
20 require an affirmation of the Administrator's Orders of
21 Suspension as issued. And specifically, I found as to
22 each of the orders, that there was not shown by
23 preponderance of the evidence a regulatory violation of
24 FAR 91.113(e). However, I did find that there was
25 established regulatory violation of FAR 91.13(a) and

1 91.113(b) and based on the discussion I have already
2 provided to the parties, I find that an appropriate
3 sanction as to both airmen would be a 15 day
4 suspension. And that will be the Order.

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7 
8 William R. Mullins
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1 JUDGE MULLINS: Gentlemen, Mr. Kirsch, and Mr.
2 Roderick, each of you has a right to appeal this order
3 today. And you may do so by filing your notice of
4 appeal within 10 days of this date. If you don't file
5 your appeal, then you need to surrender your
6 certificate within that 10 days to begin the 15 day
7 suspension. Unless you make some sort of arrangement
8 with Mr. Martin to surrender it at a different time.

9 Also if you do file your appeal within 10
10 days and within 50 days of this date, you have to file
11 a brief with the National Transportation Safety Board
12 in Washington, D.C. and of course, your notice of
13 appeal goes there also. And I have a statement of your
14 rights to appeal and Mr. Tiernan, would you step up and
15 Mr. Kirsch, and I will give each of you a copy of that.
16 These rights tells specifically the address in
17 Washington where to your notice of appeal and where to
18 send your briefs.

19 The Administrator has a right to appeal this
20 order today and I know the Administrator knows how to
21 do that. But, Mr. Martin, I will give you a copy of
22 that if you would like one.

23 MR. MARTIN: I don't need it, Your Honor,
24 thank you.

25 JUDGE MULLINS: All right. Just one caveat in

1 that regard, if 10 days has elapsed and you haven't
2 surrendered your certificate, you haven't made
3 arrangements with Mr. Martin to surrender your
4 certificate at some subsequent time, then your
5 certificate will be suspended and that suspension will
6 continue until you physically give it to the FAA and
7 then the 15 days will start. So, you need to do
8 something within this 10 day period.

9 Does the Administrator have any question
10 about the order?

11 MR. MARTIN: No, Your Honor.

12 JUDGE MULLINS: Mr. Tiernan?

13 MR. TIERNAN: No, Your Honor.

14 JUDGE MULLINS: All right. Do you have any
15 question, Mr. Kirsch?

16 MR. KIRSCH: No.

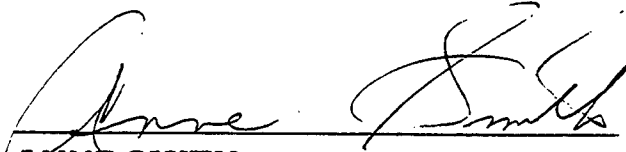
17 JUDGE MULLINS: All right. Thank you folks.

18 The hearing is terminated.

19 (Whereupon, the hearing was concluded.)

CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and order which was signed and edited on August 17, 1998, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 17th day of August, 1998.

A handwritten signature in cursive script, appearing to read "Anne Smith", written over a horizontal line.

ANNE SMITH

**Paralegal Spec/Hearings Asst.
Circuit IV, WILLIAM R. MULLINS
Administrative Law Judge
Arlington, Texas**

**LARRY KIRSCH, SE-14807RM and
PAUL E. RODERICK, SE-14832RM**

United State of America
National Transportation Safety Board
Office of Administrative Law Judges

ADMINISTRATOR
Federal Aviation Administration,

Complainant,

vs.

DAELYN DIRKSEN,

Respondent.

T R A N S C R I P T
O F
P R O C E E D I N G S

BEFORE: HONORABLE WILLIAM R. MULLINS

REPORTER: ANDREA MERCIL

A P P E A R A N C E S**NANCY-ELLEN ZUSMAN**

Attorney at Law
Federal Aviation Administration
2300 East Devon Avenue
Des Plaines, IL 60018-4686

COUNSEL FOR COMPLAINANT**MALCOLM H. BROWN**

Attorney at Law
P.O. Box 2692
209 East Broadway Avenue
Bismarck, ND 58502-2692

COUNSEL FOR RESPONDENT

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ORAL INITIAL DECISION AND ORDER

THE COURT: This has been a proceeding before National Transportation Safety Board held here in Fargo. Today is the 28th of July of 1998, and we started the hearing yesterday afternoon at 1:30. The case is captioned Administrator, Federal Aviation Administration, Complaint, vs. Daelyn Dirksen, Respondent. The Board Docket No. is SE-15305. It is an emergency case and as is mandated I will announce a decision here today on the record.

The matter came ~~on~~^{on} for hearing on an order of revocation issued by the Administrator ~~and~~^{of} the Federal Aviation Administration that has revoked this Respondent's airman's certificates, which includes both ~~certificates in~~^{an} airline transport pilot and a mechanics certificate. An order of revocation serves as a complaint ~~and~~^{in our} proceedings ~~and~~^{and} was filed on behalf of the counsel through the Great Lakes Region. The Administrator was present at all times throughout these proceedings and represented by Ms. Nancy-Ellen Zusman from the regional council's office and Ms. Mrokovich, also an attorney from the regional counsel's office. The Respondent was present at all times and was represented by Mr. Malcolm Brown, an attorney who has a law office in Bismarck, North Dakota.

The matter has been heard before William R. Mullins. I'm the Administrative Law Judge for the National

1 Safety Board. And as I indicated, I will announce my
2 decision today.

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DISCUSSION

THE COURT: Basically, there are two allegations that are made or two regulatory violations alleged against this Respondent. The first was FAR 61.59(a)(2) which alleges fraudulent and or intentional false statement made on certain records required to be maintained by the Federal Aviation Administration.

The second regulatory allegation is one of violation of FAR 91.13(a) which would be careless or reckless operation of an aircraft. In these allegations, the Administrator has the burden of establishing the evidence by a preponderance of the evidence. And preponderance of the evidence is a standard jury instruction given across the country simply means evidence which means more probably true than not true. There have been several witnesses who have testified here today, and for the most part there have not been any questions of credibility. If there are specific questions of credibility that come up through the transcript if I say that I find that person's testimony is not credible, I'm not suggesting that I think that person has lied. But I would be suggesting to you that I think that person is mistaken. And to a certain extent I will make some credibility announcements throughout this discussion. There were 11 witnesses called by the Administrator.

And first I would say that generally this

1 case involved two flights on January 19 and May 5 of 1998,
2 in a Piper Cheyenne aircraft, a turbine-powered aircraft
3 pressurized, and the purpose of the flights was so that this
4 Respondent could give to certain student pilots, who were
5 all students at that time of North Dakota University, a high
6 altitude endorsement in their logbooks and flights which
7 resulted in some of the students getting a high performance
8 endorsement in their logbook, all signed off by the
9 Respondent, Mr. Dirksen.

10 And to that extent, all of those allegations
11 have been admitted by the Respondent. Respondent has stated
12 in his answer that he thought that the high performance
13 endorsements were wrong and that it was just an error on his
14 part, that he didn't do it to intentionally falsify the
15 records and that Respondent has maintained throughout these
16 proceedings that the high altitude endorsement that he gave
17 was appropriate, that he was authorized to do so, and that
18 it was consistent with the regulation.

19 But anyway, I won't go through all of the
20 people who testified. There was Mr. Zeidlik, Mr. Smith, Mr.
21 Chang, Mr. Gerbus, Mr. Secrist, Mr. Nemec, Mr. Fiscus, Mr.
22 Fahrenwald, and Mr. Beller, who were all students and all
23 testified here. The only real exception, Mr. Zeidlik
24 apparently was the coordinator and organizer of this effort
25 after he had an occasion to meet the Respondent at some

1 apartment, I think it's in Grand Forks where the university
2 is located. I think that's the name of the town.

3 Mr. Zeidlik testified not only for the
4 Administrator but for the Respondent. But Mr. Zeidlik
5 believed, as did the Respondent, that this endorsement could
6 be made without any manipulating of the controls of the
7 aircraft and the testimony was clear that all of these
8 applicants or students went up in the aircraft, I think the
9 flight was 6-tenths of an hour. None of the applicants ever
10 had control of the aircraft. They weren't even in a pilot
11 or co-pilot seat. They came up from the back for just a
12 brief briefing by the Respondent of the pressurization
13 system. And then they went back to their seat and another
14 one came up.

15 There was a high altitude emergency descent
16 that was demonstrated, although some of the students didn't
17 even remember that. But in any event, that was part of it.
18 And then after these flights, Mr. Dirksen made the high
19 altitude endorsements in all of these logbooks that were
20 admitted and they are Exhibits A-3 through A-10. And in
21 some of those logbooks, there was reflected a high
22 performance endorsement by Mr. Dirksen and some of the
23 others who didn't have a high performance endorsement in
24 their logbook. The ones that went on the January 19 flight
25 testified that they did have a high performance endorsement

1 by Mr. Dirksen, but they had omitted it from their logbook
2 because they knew it was illegal.

3 Mr. Addison was called, and Mr. Addison is
4 the Aviation Safety Inspector for the local FSDO and he
5 testified that the high performance descent by the aircraft
6 and by feathering the props, which Mr. Addison says was not
7 authorized or specified in the aircraft's operation manual
8 is a reckless operation. And Mr. Addison further testified
9 on cross-examination that feathering a prop would be
10 appropriate if there was an engine-out procedure practiced
11 and/or demonstrated, but he didn't know whether feathering
12 of the prop was authorized by the manual or not.

13 Mr. Tom Anderson then was called to testify
14 and Mr. Anderson is a flight instructor at the University of
15 North Dakota. In fact, he's the deputy chief flight
16 instructor and he talked about one occasion he had to give
17 this high altitude endorsement and the amount of training
18 that have been given.

19 Mr. Dirksen testified then in his case in
20 chief, and he testified it was his belief that it was
21 appropriate for him to give this high altitude endorsement.
22 He admitted that it was an error to do the high performance,
23 but he just said it was a mistake on his part and he didn't
24 intend to do it. And I'm not sure I understood that.

25 Mr. Zeidlik was called again to testify for

1 the Respondent. Mr. Al Ludwig, and he's a helicopter
2 instructor pilot and has worked with the Respondent and
3 given him some ratings and also Mr. -- or Lieutenant Colonel
4 Larson was called to testify. And he is the, I think,
5 Squad^{ron}~~ron~~ Commander of the North Dakota Air National Guard
6 where Mr. Dirksen is an F-16 pilot and a captain in the
7 Guard.

8 I've indicated the logbook exhibits were A-3
9 through A-10. Administrator's A-1 is a statement written by
10 Mr. Zeidlik. A-2 is an E-mail, I think an E-mail or certain
11 announcement that Mr. Zeidlik sent out about this high
12 altitude endorsement that was going to be available. A-11,
13 although the Administrator did not offer it, it was offered
14 by the Respondent, which shows the cockpit of the Cheyenne
15 aircraft. A-12 is the emergency procedures of the Cheyenne
16 aircraft operation manual. And A-13 was some, at least some
17 pages, from the respondent's logbook.

18 Respondent's Exhibit R-1 was the altitude
19 chamber card and that's what I call it, but it's a card
20 indicating that Mr. Zeidlik had received this physiological
21 training for high altitude. R-2 was the PowerPoint
22 presentation or the slides that were use in the ground
23 training, at least for the May 5 operation. Respondent's
24 Exhibit 3 is one page of FAR 61.31. R-4 is an endorsement,
25 the page of endorsements for logbook entry from Advisory

1 Circular 61-65C. Respondent's Exhibit 5 is the old version
2 of FAR 61.31. Respondent's Exhibit R-6 is the flight
3 resume, aircraft time of the Respondent. And Respondent's
4 Exhibit 7 is the introduction the other parts of the
5 enforcement handbook, the introduction the other parts of
6 sanction guidance table to that handbook.

7 Let me just get closure on this. This is
8 not, unfortunately, has not been a difficult case for me.
9 First, let me talk about the 91.13. I don't think there's
10 been any showing of a 91.13 violation. The only evidence I
11 have is a reckless ^{operation} testified to by Mr. Addison, certainly
12 there would be some evidence if there is a procedure that is
13 specifically violated by an operation's manual. That a
14 pilot deliberately demonstrates to students, then I think
15 that that would be some evidence of a reckless operation.
16 As pointed out, there are many procedures that may not be
17 specifically authorized by an operation's manual but that I
18 don't think in and of itself shows carelessness. But,
19 again, the only testimony I have is a reckless operation.

20 And the testimony of the Respondent was that
21 he had received some training at Flight Safety and also
22 SimCom, a couple of organizations who give training in
23 specific types of aircraft, and he says that they had used
24 this procedure and he gave the reasons why they used the
25 feathering procedure: Provided for a rapid descend without

1 the nose down, altitude of the aircraft, and which created a
2 situation where if there needed to be a recovery, there
3 wouldn't be such a violent maneuver or an exaggerated
4 maneuver to get the aircraft straight ^{and} level. I think the
5 testimony on that regard just satisfies me that there is no
6 showing by a preponderance of the evidence there was ~~some~~
7 regulatory violation.

8 However, I do find that there was a
9 preponderance of the evidence the regulatory violation of
10 FAR 61.59(a)(2) in that I find that both of the types of
11 endorsements that Mr. Dirksen put in these logbooks ~~was~~
12 ^{was} intentional falsification. And that intentional
13 falsification was defined in the Hart vs. ^{McLucas} ~~McLuko~~ (sp), a
14 case which is sort of the guiding case for all of our
15 considerations. And specifically, the entries were false.
16 Mr. Dirksen knew they were false. And that if a logbook is
17 required to be maintained by the Federal Aviation
18 Administration and that very much is all that needs to be
19 established. I would give the Respondent that flight
20 training, you might be able to give flight training without
21 a student manipulating the control of the aircraft, but
22 that's not what the endorsement said. And the regulation
23 itself and I'll just read from the regulation says that the
24 endorsement in the person's logbook or training from an
25 authorized instructor, and that would be Mr. Dirksen, if who

1 found the person proficient pressurized aircraft. Is that
2 the same thing as the pressurization system? It says very
3 clearly proficiency in the operation of a pressurized
4 aircraft. And the only way that I could possibly imagine
5 that you could do that is if somebody has exercised
6 proficiency in the operation of an aircraft. The
7 pressurized aircraft.

8 Again, that same definition by the high
9 performance and, again, it requires that the person that
10 made the endorsement be satisfied that the person is
11 proficient in the operation of the aircraft, and you can't
12 operate an aircraft from a back seat. I don't know of one
13 unless it's a two-seat back or that you could operate it
14 from the back seat. Certainly, a Cheyenne aircraft can not
15 be operated from the passenger seats. And these witnesses,
16 in their testimony, were very clear none of them ever
17 operated the aircraft. And, therefore, I find that the
18 Administrator's order as to a revocation of the airman's
19 certificate should be sustained.
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ORDER

THE COURT: Administrator's emergency order
of revocation ^{Q5} ~~is~~ issued. And specifically, I found as
provided in the discussions, that I've just given that there
was not established by a preponderance of the evidence the
regulatory violation alleged of FAR 91.13(a). However, I
did find that there was established by a preponderance of
the evidence the regulatory violation of FAR 61.59(a)(2).
And having so found that, I do find that an appropriate
sanction in this case would be the revocation of Mr.
Dirksen's airman's certificates as set forth and admitted to
in paragraph one of the order of revocation.

Honorable William R. Mullins
Administrative Law Judge

1 **THE COURT:** Now, Mr. Dirksen, you have the
2 right to appeal this order today and you may do so by filing
3 your order of appeal within two days of this date and that
4 notice of appeal must be filed with the National
5 Transportation Safety Board office of Administrative Law
6 Judges in Washington and I'll give you that address, and I'm
7 sure Mr. Brown has that address. And then within five days
8 after the appeal dates then a brief needs to be file in
9 support of your appeal and that appeal goes to the office of
10 the General Council of the National Transportation Safety
11 Board in Washington, D.C., and again that address is
12 provided on there.

13 And, Mr. Brown, I'd ask that you come forward
14 and let the record reflect that I've handed you a copy of
15 your compliance right to appeal an emergency case.

16 **MR. BROWN:** I acknowledge receipt, your
17 Honor.

18 **THE COURT:** Thank you. Mr. Brown, do you
19 have any question about the order today?

20 **MR. BROWN:** No, your Honor.

21 **THE COURT:** All right. Does the
22 Administrator have any question about the order?

23 **MS. ZUSMAN:** No, your Honor.

24 **THE COURT:** All right. Thank you folks. The
25 hearing is terminated.

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(The proceedings were concluded 12:05 p.m.)

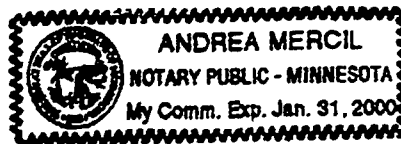
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REPORTER'S CERTIFICATE

I, **Andrea Mercil**, a general shorthand reporter, 123 1/2 Broadway, Fargo, North Dakota, do hereby certify that the foregoing two hundred seventy-seven (277) pages of typewritten material constitute a full, true, and correct transcript of my original stenotype notes, as they purport to contain, of the transcript of proceedings reported by me at the time and place hereinbefore mentioned.

Andrea Mercil

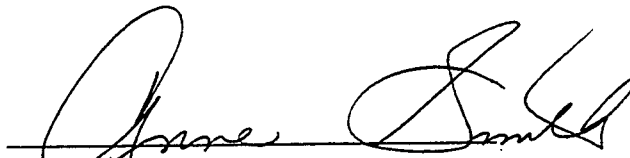
Andrea Mercil
123 1/2 Broadway
P.O. Box 3165
Fargo, North Dakota 58108



Dated this 3rd day of August, 1998.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and order which was signed and edited on August 17, 1998, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 17th day of August, 1998.



**ANNE SMITH
Paralegal Spec/Hearings Asst.
Circuit IV, WILLIAM R. MULLINS
Administrative Law Judge
Arlington, Texas**

**DAELYN DIRKSEN
SE-15305**

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10/2

Served: July 28, 1998

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES**

Application of

JAY M. HAMILTON

Docket No. 260-EAJA-SE-14617

for fees and expenses under the
Equal Access to Justice Act.

**ORDER GRANTING APPLICATION FOR AWARD OF REASONABLE ATTORNEY
FEES, COSTS AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Service: David McDonald, Esq.
1393 SW First Street
Miami, FL 33135
(By Fax and Certified Mail)

Jay M. Hamilton
10305 NW 6th Street
Plantation, FL 33324
(By Certified Mail)

Danvers E. Long, Esq.
Federal Aviation Administration
Southern Region at Orlando
5950 Hazeltine National Drive
Suite 510
Orlando, FL 32822
(By Fax and Certified Mail)

William A. Pope, II, Administrative Law Judge: The Applicant filed a "Motion for Award of Reasonable Attorney's Fees, Costs and Expenses Pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504," on April 20, 1998,¹ seeking an award against the Administrator of the Federal Aviation Administration for attorney's fees, costs, and expenses in the amount of \$12,994.21.² The Administrator filed her "Answer in Opposition to Applicant's Application for EAJA Fees" on May 18, 1998. The Applicant's "Reply to Administrator's Answer to Application for EAJA Fees" was filed on June 2, 1998. The Application is now ready for decision.

The Application and supporting documents filed by the Applicant establish that he meets the eligibility requirements set out in the Equal Access to Justice Act and the

¹ This case was finally disposed of on March 26, 1998, which is the date of the Board's Opinion and Order. The application was filed by certified mail on April 20, 1998. Therefore, the application was filed within 30 days after the Board's final disposition, and was timely filed under § 821.7(a) of the Board's Rules of Practice in Air Safety Proceedings.

² This is a proceeding filed under the Equal Access to Justice Act, 5 U.S.C. § 504 ("EAJA"), and the Board's Rules Implementing the Act ("EAJA Rules"), 49 C.F.R. Part 826.

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Board's Rules implementing that Act, and the Application is both timely and procedurally correct.

I

At the conclusion of a three-day evidentiary hearing held on January 15-17, 1997, this judge issued an oral initial decision dismissing the Administrator's Order of Suspension,³ alleging that on January 2 and January 3, 1995, the Applicant served as second-in-command on passenger revenue flights, in a Lear 55 jet, operated by Alamo Jet, Inc., under Part 135 of the Federal Aviation Regulations, when he had not passed a written or oral test and a competency check within the prior 12 months flight, as is required by FAR §§ 135.293(a) and (b).⁴ The Administrator appealed from the oral initial decision, and, on March 26, 1998, the Administrator's appeal was denied by the Board, and the oral initial decision was affirmed.⁵

As noted by the Board in its Opinion and Order, this judge's initial decision was based on his determination that, as a matter of law, the subject flights were not operated under Part 135, based on a factual finding that the passengers on the subject flights were the aircraft's owner and his nonpaying guests. In the initial decision, this judge specifically found credible the Applicant's testimony that, when he was asked to serve on the subject flights, he questioned whether the flights were to be operated under Part

³ The Administrator's Order of Suspension, dated July 29, 1996, was re-filed as the complaint in the underlying proceeding on August 23, 1996, under the provisions of § 821.31 of the Board's EAJA Rules.

⁴ The Order of Suspension states in pertinent part:

1. At all times material herein you were and are now the holder of Airline Transport Pilot [("ATP")]Certificate No. 002158027.

2. On or about January 2 and 3, 1995, you served as second in command (First Officer) in a Lear 55 jet on a passenger revenue flight operated by Alamo Jet, Inc., under Part 135.293 of the Federal Aviation Regulations.

3. When you served as Second in Command in the Lear 55 on the flight described in paragraph 2 above, you had not, within the 12 calendar months prior to that service, passed a written or oral test on the subjects described in section 135.293 of the FAR.

4. When you served as second in command in the Lear 55 on the flight described in paragraph 2 above, you had not, within the 12 calendar months prior to that service, passed a competency check in the class of aircraft in which you served.

5. As a result, you violated the following sections of the Federal Aviation Regulations:

a. Section 135.293(a) in that when you served as a pilot in the Lear 55 as described above you had not, within the preceding 12 calendar months, passed the written or oral test described in section 135.293 of the FAR.

b. Section 135.293(b) in that when you served as a pilot in the Lear 55 as describe above you had not, within the preceding 12 calendar months passed the competency check in the class of aircraft in which you served.

⁵ NTSB Order EA-4647. Both parties argued on appeal the validity of this judge's finding that the Applicant (Respondent in the underlying proceeding) met the requirement of § 135.293(a) because of a competency check administered to him within the preceding 12 months, as a requirement for his then-current position as an FAA aviation operations inspector. The Board found that this determination was not necessary for the dismissal of the complaint, and did not address it in its affirming the dismissal.

135, because he knew that he had not yet completed the Part 135 requirements for pilot qualification for his new employer, Alamo Jet, and was assured by Alamo's Director of Operations, George Stevens, that the flights were to be operated under Part 91.⁶ The Applicant, as former FAA Principal Operations Inspector for Alamo Jet, knew the owner of the aircraft, and recognized him and his girlfriend when they boarded the aircraft with friends. This judge also credited the testimony of Mr. Stevens that he annotated the flight log with the words "FAR 91" before the flight, and that whenever the Lear 55 was operated for the owner's personal use, the actual operating costs were charged to one of the owner's other companies. Also credited was the testimony of Mr. Stevens that the owner's secretary had called three weeks in advance of the flights to reserve the aircraft, and stated that the flights would be recreational flights to and from the Sugar Bowl for the owner and his friends. In accordance with instructions he received from the owner's chief financial officer, Mr. Stevens issued an invoice, charging the operating costs of the flights to DCB Enterprises, another company owned by the aircraft's owner.⁷

The Administrator relied on documents obtained from Alamo Jet to establish that the flights were operated under Part 135. These documents included the invoice from Alamo Jet to DCB Enterprises, a notation in the aircraft flight log indicating DCB Enterprises as the "customer,"⁸ and a letter written by Mr. Stevens to a county judge asking that an electronic monitoring device worn by the Applicant be removed because it would hinder his ability to be gainfully employed. The letter went on to say that his first income producing trip would be a charter to go to the Sugar Bowl on January 2. The law judge accepted the explanation given by the Applicant and Mr. Stevens that the sentence meant only that the Applicant would be paid by Alamo for the trip.⁹

II

The EAJA, 5 U.S.C. § 504, *et seq.*, requires the Government to pay to the prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. § 504(a)(1). To be a prevailing party, an Applicant need not prevail on every issue in order to receive an award of fees and expenses; rather, the Applicant need show only that he has won "a significant and discrete substantive portion of the proceeding." *Application of Swafford and Coleman*, NTSB Order EA-4426 (1996). Once that burden has been met, the Administrator must show that she was substantially

⁶ As the former FAA Principal Operations Inspector for Alamo Jet, the Applicant was well aware of the regulatory requirements.

⁷ Mr. Stevens testified that he did not inform the Applicant of the arrangement, as he did not think it was any of the Applicant's business. The Board noted that there was no evidence that DCB Enterprises ever paid Alamo Jet for the flight, and Ex. R-4 appears to suggest that DCB Enterprises is not actually incorporated to do business.

⁸ The Board noted in its decision and order that the FAA's investigators apparently made no effort to question the Applicant, Mr. Stevens, or the owner on why "Part 91" would be noted on the flight log, nor did the FAA investigators interview them on any other matter related to the investigation.

⁹ The fact that the Applicant was compensated for his services does not change the character of the flights from Part 91 to Part 135. The Board noted in its opinion that, as an ATP-rated pilot, he was entitled to be compensated for his services.

justified in her position in order to avoid an award. *Application of Wendler*, 4 NTSB 718, 720 (1983). For the Administrator's position to be substantially justified, it must be reasonable in both fact and in law, *i.e.*, the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. *Application of U.S. Jet, Inc.*, NTSB Order EA-3817 at 2 (1993); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *U.S. v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir. 1984). Reasonableness in fact and law should be judged as a whole, including whether "there was sufficient reliable evidence initially to prosecute the matter," and at each succeeding step of the proceeding. *Application of U.S. Jet, Inc.*, *supra*, at 2; *Application of Philips*, 7 NTSB 167, 168 (1990). But the Board has also made it clear that the substantial justification test is less demanding than the Administrator's burden of proof, and it is not whether the government wins or loses that determines whether its position was substantially justified. *Application of U.S. Jet, Inc.*, *supra* at 3; *Federal Election Commission v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

In *Application of Petersen*, NTSB Order No. EA-4490 at 6 (1996), the Board said that "when key factual issues hinge on witness credibility, the Administrator is substantially justified – absent some additional dispositive evidence – in proceeding to hearing where credibility judgments can be made on those issues," citing *Application of Caruso*, NTSB Order No. EA-4615 at 9 (1994); *Application of Conahan*, NTSB Order No. EA-4276 at 7-8 (1994); and *Application of Martin*, NTSB Order No. EA-4280 at 8 (1994), in which the Board said that the Administrator's position cannot be found lacking simply because the law judge discredited the testimony of a particular witness. But, in *Application of Scott*, NTSB Order No. EA-4274 at 5 (1994), the Board said that "[u]nder EAJA, the Administrator has a duty to discontinue his investigation or prosecution at any time he knows *or should know* that his case is not reasonable in fact or law, or be liable for EAJA fees for any further expenses applicant incurs. The Administrator was required to analyze, as more information became available to him, whether continued investigation and prosecution was reasonable." (Emphasis original.)

III

There is no question here but that the Applicant was the prevailing party in this proceeding. The issue that remains in determining whether or not he is entitled to an award under the EAJA is whether the Administrator was substantially justified in her position.

The three pieces of documentary evidence relied upon by the Administrator, which included the invoice addressed to DCB Enterprises, the identification of DCB Enterprises as the customer in the flight log, and a letter from Mr. Stevens to the county judge, with nothing else, are at least minimally sufficient to establish a *prima facie* case that the flights were operated under Part 135. However, the aircraft's flight log for the flights also bears a notation in the upper right corner reading "Part 91." That notation, which apparently was overlooked or ignored by the Administrator's investigators, is on its face inconsistent with the Administrator's theory that the flights were Part 135 flights, and, at the very least, raised a substantial unresolved question about the true character of the flights.

The Administrator was required at each step of the proceeding to analyze, as more information became available to her, whether continued investigation and prosecution was reasonable. Here, despite the apparent discrepancy on the face of the flight logs concerning the character of the flights, *i.e.*, whether they were conducted under Part 91 or Part 135, the Administrator's investigators made no effort, insofar as the record reflects, to resolve the apparent conflict by taking any other investigative steps, such as by questioning the Applicant, Mr. Stevens, the owner of the aircraft, or, for that matter, anyone else associated with Alamo Jet. Whether or not to believe whatever explanation may have been forthcoming had such interviews been conducted would, of course, be an issue of credibility. Here, the problem is that the Administrator did not investigate far enough to discover what the explanation, if any, was, and, therefore, had no basis for making a decision to continue the prosecution on the theory that it turned on credibility issues. The failure of the Administrator's investigators to conduct any follow-up investigation on the notation "Part 91" on the aircraft's flight log was unreasonable, and, in turn, the continued prosecution of the case without a thorough investigation of this obvious discrepancy was unreasonable.

Therefore, I find that the Administrator's position in the underlying matter was not substantially justified, and that the Applicant is, thus, entitled to recover attorney fees and expenses under the EAJA.

IV

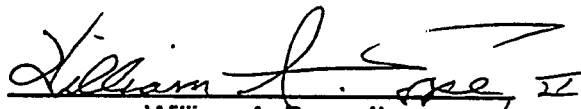
The remaining question is the amount of attorney fees and expenses which the Applicant should be awarded here. Although the Administrator opposes an award of any attorney fees and expenses on other grounds, she has not objected to the specific amounts claimed by the Applicant. I have examined the Applicant's detailed claim for attorney fees and expenses, and I find them reasonable. Although the Applicant's attorney appears to have charged an hourly rate of \$175.00 for his professional services, the Applicant claims reimbursement at the rate of \$132.42, which I have rounded up to \$133.00, which is the maximum amount allowable under § 826.6 of the Board's EAJA Rules. Therefore, the Applicant is entitled to an award of \$12,475.40 (93.8 hours x \$133.00/hour) for attorney fees, as well as expenses in the amount of \$573.21, for a total award of \$13,048.61.

ORDER

Accordingly it is hereby ORDERED that:

1. The Applicant's Application for Award of Attorney's Fees, Costs and Expenses under the Equal Access to Justice Act is GRANTED, in the total amount of \$13,048.61.
2. The Administrator shall, in accordance with this Order, pay to the Applicant the sum of \$13,048.61 within 30 days of the date hereof.

Entered this 28th day of July, 1998, at Washington, D.C.


William A. Pope, II
Judge

APPEAL

Any party to this proceeding may appeal this written initial decision and order by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
490 L'Enfant Plaza, East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision or order. An original and 3 copies of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza, East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of the other party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and 3 copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on the other party.

An original and 3 copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rule 38 of its Rules Implementing the Equal Access to Justice Act (codified at 49 C.F.R. section 826.38) and Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY
Administrator
Federal Aviation Administration

Complainant,

v.

Docket No.: SE-15171
HON. WILLIAM E. FOWLER, JR.

THOMAS PETERS,

Respondent.

Proceedings were held before the aforementioned
Administrative Law Judge on Tuesday, July 28, 1998,
United States Tax Court, 231 West Lafayette, Room 103,
Detroit, Michigan, pursuant to Notice.

APPEARANCES:

MICHAEL F. MCKINLEY, ESQ.
FAA Great Lakes Region
2300 East Devon Avenue
Des Plaines, IL 60018
847.294.7109

On behalf of the Complainant

~~XXXXXXXXXX~~
On behalf of the Respondent

RESPONDENT - PRO SE

REPORTED BY: GRETCHEN L. SCHULTZ, CER 3573

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958 as that Act was subsequently amended.

On the appeal of Thomas Justin Peters from an Order of Suspension issued by the Regional Counsel of the Great Lakes Region, ^{of} the Federal Aviation Administration, ~~S~~aid Order of Suspension was issued on March 11th, 1998, and seeks to suspend for a period of 180 days the Airline Transport Pilot Certificate number 1847148 of Respondent Peters.

Under the National Transportation Safety Board's Rules of Practice as they have been promulgated for utilization in air safety enforcement proceedings, ~~as we have~~, the Administrator's Order of Suspension serves herein as the Complaint and was filed on behalf ^{HEREIN THE COMPLAINANT} of the Administrator through his Regional Counsel, Great Lakes Region of the Federal Aviation Administration.

This matter has been heard before this United States Administrative Law Judge ^{PURSUANT TO} ~~and under~~ Section 821.42 of the Board's Rules of Practice I have chosen to issue an Oral Initial Decision at this time as opposed to a subsequent written decision.

Following Notice ^{TO} ~~at~~ the parties, this matter came on

1 for trial on July 28th, 1998 in Detroit, Michigan. The
2 Respondent, Thomas Justin Peters, represented himself,
3 and proceeded ~~in~~ pro se ~~where~~ where the hearing in
4 this matter was concerned. The Administrator was
5 represented by Michael McKinley, Esquire, of the Great
6 Lakes Office of the Federal Aviation Administration.
7 Both parties have been afforded the opportunity to
8 present testimony, to offer evidence, to call and
9 examine and cross-examine witnesses. In addition the
10 parties were afforded the opportunity to make argument
11 in support of their respective positions.

12 This case in a sense is somewhat puzzling to me
13 because Respondent Peters is an Airline Transport rated
14 pilot. This means that he is the highest certified
15 pilot granted certification by the Administrator of the
16 Federal Aviation Administration, and as such he is
17 accountable and held to the highest degree of care,
18 responsibility, prudence, thoughtfulness and
19 carefulness.

20 This standard was certainly deviated from by
21 Respondent Peters on April 14th, 1997 in the vicinity of
22 Willow Run Airport at Willow Run, Michigan. ~~At~~ This date,
23 time and place by the Respondent's deviation from the
24 air traffic controller's clearance that he was given.
25 It is somewhat puzzling to me that a pilot of this

1 caliber could deviate from a clearance and was told when
2 he had deviated from it, not once, not twice, but
3 possibly even three times, ^{AND} still remained in an area
4 where he shouldn't have been and where he was told
5 several times not to be, and ~~made~~ no immediate effort to
6 leave from that area, and therefore and thereby
7 constituted a hazard to other aircraft in that area.

8 Fortunately air traffic was light at the time,
9 which was about 4:30 p.m., in the afternoon of April
10 14th, 1997, and a most fortunate aspect of this entire
11 case is that there was no accident, there was no damage,
12 there was no injury, there was no fatalities to anyone
13 concerned.

14 Certainly Mr. Peters has learned a lesson from this
15 proceeding, and as I stated earlier it's somewhat of a
16 puzzle to me. A pilot of his caliber to be involved as
17 he was in this particular incident. Perhaps he summed
18 it up himself in his testimony, to wit, he had ^{HAD} a bad
19 day. But a bad day does not excuse a deviation from an
20 air traffic controller, a clear disregard of an air
21 traffic controller's instructions. ~~And by~~ ^{And} by doing this he
22 constituted a hazard, as I stated earlier, and as
23 Aviation and Safety Inspector Gerald Holder said, he was
24 reckless.

25 It's hard to say that an individual was reckless

1 when usually coupled with the term reckless is the
2 adverbs willful and wanton. I do not find that to be
3 the case here based on the totality of the evidence.
4 But by no stretch of the imagination can I say that this
5 violation or violations was inadvertent. Confused,
6 perhaps he was. And maybe as previously alluded to, it
7 was a bad day for Mr. Peters. But an Airline Transport
8 Rated Pilot, as I stated a moment ago, is held to the
9 highest degree of care. There is nothing about this
10 conduct that is excusable, and I certainly cannot find
11 that the Administrator was not validly premised in every
12 sense of the word in bringing this Order of Suspension
13 against the Respondent.

14 I will accept taking into account the totality of
15 all of the evidence. Counsel for the Administrator's
16 recommendation where the modification of the sanction is
17 concerned, which I think is generous on the part of the
18 Administrator in view of the totality of the facts and
19 circumstances here. And I will accept Administrator's
20 recommendation to reduce the sanction from 180 day
21 period of suspension to 120 day period of suspension.

22 And let me say because the National Transportation
23 Safety Board has said ad infinitum, a compelling,
24 economic interest is not a sufficient reason for a Judge
25 to reduce or modify the sought sanction by the

1 Administrator if the Administrator has proven his case,
2 which he has done here, every aspect of it. And I said
3 it was generous of the Administrator to reduce his
4 sanction and I will accept that reduction.

5 So that ladies and gentlemen based on my review of
6 all of the evidence and testimony in this proceeding I
7 will make the following specific Findings of Fact and
8 Conclusions of Law.

9 1: The Respondent, Thomas Justin Peters admits and
10 it is found that he was and is the holder of Airline
11 Transport Pilot Certificate Number 1847148.

12 2: The Respondent admits and it is found that on
13 or about April 14th, 1997, Respondent acted as pilot in
14 command of civil aircraft N-6569 L, Mitsubishi Model
15 MU-2 on a VFR flight from Willow Run Airport, Ypsilanti,
16 Michigan to New York State.

17 3: It is found that the Respondent was instructed
18 by Willow Run Air Traffic Control Tower to fly due
19 southbound and remain clear of Detroit Class Bravo B
20 airspace and to contact Departure Control.

21 4: It is found that Respondent acknowledged that
22 instruction.

23 5: It is found that despite the instruction from
24 the air traffic control, ^{to} the Respondent, Thomas J.
25 Peters, to remain clear of the Detroit Class B airspace,

1 the Respondent operated his aircraft in that airspace
2 without authorization from air traffic control.

3 6: It is found that Respondent continued to climb
4 southbound in that airspace even after air traffic
5 control instructed Respondent to remain outside that
6 airspace.

7 7: It is found there was no emergency which
8 allowed Respondent to operate in that airspace at that
9 time.

10 8: It is found that the Respondent's operation was
11 deliberate and reckless and potentially endangered the
12 life and property of others.

13 9: It is found that by reason of the foregoing
14 circumstances the Respondent violated the following
15 Federal Aviation Regulations:

16 a) Section 91.123(a), which prohibits a pilot in
17 command from deviating from an ATC clearance
18 unless he obtains an amended clearance except
19 in an emergency.

20 b) Section 91.123(b), which prohibits a person
21 from operating an aircraft contrary to a ATC
22 instruction in an area in which air traffic
23 control is exercised unless there is an
24 emergency.

25 c) Section 91.139(a)(1), which prohibits a person

1 from operating an aircraft within the Class B
2 unless he has received an appropriate
3 authorization from ATC prior to operation of
4 that aircraft in that area.

5 d) Section 91.13(a), which prohibits any person
6 from operating an aircraft in a careless or
7 reckless manner so as to endanger or
8 potentially endanger the life or property of
9 another.

10 10: This Judge finds that safety in air commerce
11 or air transportation and the public interest does
12 apparently require the affirmation of the
13 Administrator's Order of Suspension dated March 11th,
14 1998. In view of the aforesaid violations of Section
15 91.123(a), Section 91.123(b), Section 91.131(a)(1), and
16 Section 91.13(a). However, in view of all the
17 particular and peculiar facts and circumstances
18 pertaining to and surrounding this case, and in
19 particular the Administrator's recommendation for
20 reduction in the sought sanction it is my determination
21 that the Administrator's sanction of 180 days period of
22 suspension of the Respondent's Pilot Certificate be
23 modified to a period of suspension of 120 days.

24 ORDER: IT IS ORDERED that the Administrator's
25 Order of Suspension, dated March 11th, 1998, be in the

1 same ~~as~~^{is} modified to a period of suspension for the
2 Respondent's Airline Transport Pilot Certificate Number
3 1847148 for a period of 120 days as opposed to the
4 original sought sanction of suspension of 180 days.

5 This Order is issued by William E. Fowler, Jr., a
6 United States Administrative Law Judge.

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WILLIAM E. FOWLER, JR.

11 Administrative Law Judge

12 *Edited*
13 *8-27-98*
14 *WEF Jr.*
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1 Now, under the heading of appeal. Either party may
2 appeal the Judge's Oral Initial Decision. The Appellant
3 shall file his Notice of Appeal within 10 days of
4 today's decision which is dated July 28th, 1998, and the
5 Appellant in order to perfect his appeal must file a
6 brief setting forth his objections to the Judge's Oral
7 Initial Decision within 50 days following the Judge's
8 Oral Initial Decision. Such be shall set forth clearly
9 the Appellant's objections to the Judge's decision.

10 ^{THE} Notice of Appeal and the brief shall be filed
11 with the National Transportation Safety Board Office of
12 Judges, 490 L'Enfant Plaza East, Southwest, Washington,
13 DC, 20594. If no appeal to the Board from either party
14 is received or if the Board of its own volition does not
15 choose to review the Judge's Oral Initial Decision
16 within the time allowed, then the Judge's Decision shall
17 become final. Timely filing of such an appeal however
18 shall stay the Order as set forth in the Judge's
19 decision.

20 Off the record.

21 (At 1:57 p.m., off the record)

22 (At 2:00 p.m., back on the record)

23 JUDGE FOWLER: Let the record indicate that
24 Respondent has indicated, at least as of this moment, he
25 does not contemplate filing a Notice of Appeal ^{FROM} ~~the~~ the

1 Judge's Oral Initial Decision.

2 I assume the Administrator will not be filing a
3 Notice of Appeal?

4 MR. MCKINLEY: No, Your Honor. Just so Mr. Peters
5 is fully aware of the situation. He obviously can have
6 the 10 days to think about it or he may surrender his
7 license to me today and the suspension would start
8 today.

9 JUDGE FOWLER: Thank you, Mr. McKinley. I meant to
10 mention that.

11 If, Mr. Peters, you are firm in your belief that
12 you will not be filing a Notice of Appeal, then as
13 Counsel for the Administrator just said, you may
14 surrender your certificate, physically surrender to
15 Counsel for the Administrator, and thus the period of
16 suspension of 120 days would become immediately
17 operative and begin to run as to today. So you may
18 think about that for a moment, although you have 10 days
19 technically to --

20 MR. PETERS: Well it's been reduced as I understand
21 it from 180 days to 120 days starting today.

22 JUDGE FOWLER: If you surrender your Certificate --

23 MR. PETERS: So you want me to give it to him right
24 now?

25 JUDGE FOWLER: -- to Counsel for the Administrator.

1 MR. MCKINLEY: It's up to you.

2 MR. PETERS: I might as well do it right now then.

3 (Respondent surrendered Certificate, 2:00 p.m.)

4 JUDGE FOWLER: Well, let the record indicate that
5 Respondent is surrendering his Certificate forthwith at
6 this time to Michael McKinley, Counsel for the
7 Administrator, which means that the period of suspension
8 of 120 days will immediately become operative.

9 MR. MCKINLEY: And for the record I have been
10 handed a Airline Transport Pilot Certificate Number
11 1847148 with Airplane Multi-engine Land, IA Jet,
12 Commercial Privileges, Airplane Single Engine Land, and
13 in the name of Thomas Justin Peters.

14 JUDGE FOWLER: Let the record so indicate.

15 Ladies and gentlemen before we go off the record
16 let me express my profound thanks to Counsel ^{For} ~~to~~ the
17 Administrator and to Respondent Peters for their very
18 diligent and erudite efforts on behalf of their
19 respective sides of the case.

20 I would also like to express my thanks to all of
21 the witnesses for their help, assistance and
22 cooperation, and for all of you present here during the
23 course of this proceeding.

24 Thank you all very much, we stand adjourned.

25 (At 2:01 p.m., proceedings concluded)

C E R T I F I C A T E

STATE OF MICHIGAN) SS
COUNTY OF WAYNE)

I certify that this transcript, consisting of 176 pages, is a complete, true, and correct record of this proceeding, held in this matter on Tuesday, July 28, 1998.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or financially interested in the action.

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